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**The Concept of Effective Remedies in the Albanian Legal System,
Particularly as Regards Meeting its Obligations under the
European Convention on Human Rights, (art. 13).**

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Preface

This thesis provides an analysis of the application of article 13 of the European Convention on Human Rights in Albanian legal system. The principal sources of the analysis of the requirement of article 13 are the practice of the European Court of Human Rights and the legal scholarship on the subject, while the analysis of the features of Albanian legal system is primarily based on the relevant Albanian laws, legal scholars' work and interviews. Currently, in Albania it is very difficult to obtain accurate data regarding court decisions and administrative acts. Recordkeeping is very basic and there is not yet a comprehensive statistical system. This is especially notable in the judicial system, which was seriously damaged during the civil unrest of March 1997. Most of the courts lost records of the cases, and were also physically destroyed in some instances. Consequently, it has been practically impossible to receive accurate information regarding practical cases of courts and other state bodies. For this reason, the analysis of the main features of the legal system in Albania is restricted mainly to the theoretical level.

The basic sources of information and materials used for the analysis of Albanian legal system are collected during the time I have been working as an associate attorney at the Legal Counselor's Office of the Organization for Security and Cooperation in Europe (OSCE) Presence in Albania. For the preparation of this thesis, I owe very much to my colleagues at the Legal Counselor's Office for their support and availability. A special thanks goes also to my two supervisors, Pr. Jeremy McBride and Pr. Attila Horvath for the great help and dedication and patience.

This thesis reflects the information gathered as of the date of its submission.

Evis Alimehmeti

28 June 2000

Abbreviations

app.	application
art.	article
Convention	European Convention on Human Rights
EHRR	European Human Rights Reports
European Court/Court	European Court of Human Rights
European Commission/Commission	European Commission of Human Rights
<i>et al.</i>	and others
HRAP	Human Rights Alert Program
HR Rev.	Human Rights Review
<i>Id.</i>	<i>idem</i>
No.	number
OSCE	Organization for Security and Cooperation in Europe
p., pp.	page(s)
para.	paragraph
Vol.	volume
Yearbook	Yearbook of the European Convention on Human Rights

Executive Summary

This thesis analyses the application of article 13 of the European Convention on Human Rights in the legal system of Albania. It compares the standards of the requirements of article 13, as interpreted by the European Court of Human Rights and different legal scholars, with the laws and procedures in use in the Albanian legal system. The goal of the thesis is to assess the quality and scope of the legal protection of the right to effective remedy in Albania as provided by article 13.

Although the case law practice of the European Court of Human Rights is not very decisive with regard to the requirements of article 13, the main principles of its application are now identifiable. The analysis of the concept of effective remedies under article 13 as elaborated by Harris, O'Boyle, and Warbrick, provides a very concise scheme of the key elements that this article entails. They identify four elements of the concept of effective remedies. Firstly, *institutional effectiveness*, according to which, the national authority that will deal with the claim of violation of any of the rights under the European Convention on Human Rights must be independent from the authority allegedly responsible for the violation committed. Secondly, *substantial effectiveness* that presupposes the possibility of the individuals to canvass the substance of the Convention from the domestic laws, although the Convention may not be part of them. Thirdly, *remedial effectiveness*, which requires that if the applicants' substantive arguments are accepted by the national authority that is responsible to deal with their claims, the latter must be in the position to grant them a remedy. Finally, *material effectiveness*, which requires not only the availability of effective remedies in the national legal system, but also the possibility of taking advantage of it.

Following 45 years of a closed and centralized political regime, where the notion of human rights was a very restricted and almost a nonexistent one, Albania adopted a

democratic system of government in 1991. A special constitutional regime was adopted, consisting of a package of constitutional laws, one of which provided a substantial set of guarantees for the protection of human rights and freedoms of the individuals. A proper Constitution was adopted 7 years later, containing provisions considered advanced for the protection of human rights and the status of international law in the domestic legal system. The provisions of this Constitution established for the first time in Albania the institution of the Ombudsman. According to the provisions of the Constitution, the Constitution is the highest legal norm in the country, followed by the international ratified treaties.

The judicial system was also reformed upon the establishment of the democratic regime. It started functioning as an independent branch of the power, where the individuals could address their complaints against wrongful actions of state authorities. The Constitutional Amendment No. 7561, dated 29 April 1992, established a three-tier judicial system composed of District Courts, Courts of Appeals and the High Court. It also established a Constitutional Court, as the exclusive authority to interpret the Constitution.

According to the current legal regulation in Albania, the judicial and administrative bodies are the only state authorities that have binding powers to decide on cases of violations of individuals' rights. Theoretically, the Albanian judicial system complies adequately with the requirements of *institutional effectiveness*, while the practical aspect is equivocal and does not match completely with the theoretical panorama. Administrative bodies also comply at a considerable degree with *institutional effectiveness*, as demonstrated in the thesis, although certain procedures of complaints do not fit with the standards of the interpretations of the European Court of Human Rights concerning the notion of independence.

The substance of the European Convention on Human Rights is incorporated in the constitutional provisions and is directly enforceable before the Albanian courts. Moreover, the Convention has a constitutional status, and thus, is the highest norm of the country.

Consequently, the principal criteria of *substantive effectiveness* are fully supported by the Albanian legal system.

Criminal and civil courts have sufficient powers to deal with individuals' complaints regarding violations of their rights. They can resolve the respective conflicts and also repair the harm occurred, except for the cases where the illegal decision was partially affected by the actions of the individuals. The powers of the Constitutional Court are also *remedially effective* for the claims of violation of the rights to due process, at the extent that its decisions oblige the ordinary courts to repair the violation committed. The same *remedial effectiveness* characterizes the powers of the Albanian administrative bodies, while the powers of the Ombudsman are not sufficient to respond effectively to the individuals' claims of violations of their rights, as intended by article 13.

All individuals may take advantage of the guarantees provided in the legal system. Even those with limited legal capacities may access the legal recourses available in the local and international level, through their legal representatives. However, in practice individuals do not fully benefit from the theoretical guarantees, due to deficiencies in the enforcement of courts' rulings that impose an obligation on the state authorities to remedy the violations of individuals' rights. This is a consequence of the gaps in the procedural laws with regard to this matter, and the improper application of the sanctions provided for non-compliance with the courts' rulings. It constitutes as well a ground for claiming a lack of *material effectiveness*.

As a conclusion, the requirements of *the institutional and substantial effectiveness* are implemented to a considerable extent in the Albanian legal system, while the requirements of the other two components, namely *the remedial and material effectiveness* are not fully guaranteed. The scarce practical enjoyment of the theoretical guarantees is a serious weakness of the Albanian legal system. Especially, the inefficiency of the legal system to

secure the implementation of the rulings of judicial bodies could be considered as a denial of effective remedies to the harmed individuals. Consequently, my conclusion is that the features of the legal system of Albania address to a considerable extent the requirements of the right to effective remedy. However, there exist ample grounds on which a violation of article 13 may be alleged.

INTRODUCTION

1.1 Rationale and organization of the thesis

The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in November 1950,¹ is without doubt one of the most outstanding achievements of the Council of Europe engagements in the field of human rights protection. The states that have ratified the Convention are under the obligation to respect and guarantee to the individuals the set of rights and freedoms included therein. One of the most important, but at the same time one of the most difficult articles to implement in practice, is article 13, which requires the contracting states to provide effective domestic remedies, where the rights and freedoms guaranteed by the Convention are violated. This is obviously important, since it not only guarantees redress for any violations committed, but also requires explicitly that the national authorities be the ones to provide remedies. Obviously, the intention is to enhance the efficiency of the domestic systems, which will be reflected in turn by fewer cases brought before the Strasbourg authorities.

In order to comply with the requirements of article 13, it is necessary to rely on the main principles of the concept of effective remedies, as identified by the practice of the European Court of Human Rights and the European Commission of Human Rights.² The interpretation of different legal scholars has also contributed to expand and clarify the meaning of the requirements of article 13.

¹ Hereafter referred as "the Convention."

² Hereafter referred as "the European Court" and "the European Commission."

Currently, in Albania there is a notable lack of analysis and surveys by legal scholars on the compatibility of the domestic laws with the international standards of the treaties to which Albania is a party. This is especially remarkable in the field of human rights protection. Naturally, this is related to the little experience with regard to domestic application of the international law and compatibility exercise, given the recent changes in the legal regime. However, taking into account the negative experiences of Albanian citizens as regards human rights protection during the Communist regime, a proper implementation of the provisions of the Convention, as well as, the provisions of other human rights treaties ratified by Albania, becomes more significant. As a new member of the Convention (since 4 years), there is a strong need for legal assessments of this type, with the aim of helping Albanian legal system to reach as much as possible the standards of the Convention.

This thesis will examine the way the requirements of effective remedies, as provided by article 13 of the Convention, are met by the legal system of Albania. It will show that not all the essential aspects of the concept of effective remedies are adequately applied in the Albanian legal system. Chapter I gives a short historical background of the political and legal changes in Albania after 1990. This part introduces the relevant features of the Albanian political and legal environment during the communist regime, with special focus on the human rights of the individuals. It also describes the evolution of the legal protection of human rights since the installation of the new democratic regime in 1991. Traditional features of the legal system of Albania are also treated in this chapter, as an introductory step for the further analysis of other aspects of the legal system.

Chapter II identifies the principal components of the concept of effective remedies, as resulting from both the interpretation of the European Court and the European Commission in the relevant case law, and also the academic thought on the subject. The conclusions of this part serve as the basis of the whole inquiry related to the compatibility of the features of the

Albanian legal system with the requirements of article 13. Thus, this chapter provides the framework on which will be based the analysis of the subsequent chapters.

Chapter III presents a general overview of the constitutional framework of Albania and the judicial and administrative system. Its goal is to identify the range of recourses available in the local level for the cases of alleged violations of the individuals' rights. The principal considerations are the place of the individuals' rights in the constitutional provisions of Albania and the status of the international law in the domestic law. Moreover it identifies the main public institutions that deal with the claims of the individuals regarding violations of their human rights and that are entitled to afford remedies. These subjects are analyzed from a comparative perspective between the constitutional regulation of 1991 and the provisions of the Constitution adopted in 1998.

Chapter IV elaborates the institutional independence of the Albanian authorities, based on the parameters of the notion of independence as identified in the chapter II. It analyses the amount of independence that Albanian laws afford to the courts and administrative bodies, as the only national authorities responsible for dealing with the claims of individuals alleging a violation of their rights. Its aim is to arrive to a conclusion with regard to the compatibility of institutional effectiveness with the relevant Albanian laws, and the practical implications.

Chapter V analyses the scope of application of the substance of the rights contained in the Convention in the Albanian laws, as the second component of the concept of effective remedies. The incorporation of the Convention in the domestic law, its place in the hierarchy of the legal norms, as well as the enforceability of its provisions in the domestic courts are the issues treated in this chapter. It includes an evaluation of the constitutional provisions and other laws that enable the individuals to raise a claim regarding the infringement of one of the rights of the Convention.

Chapter VI assesses the powers of the Albanian authorities that are formally in the position of dealing with the claims of an alleged violation of the Convention, in terms of their abilities to remedy effectively the violations occurred. This chapter includes an analysis of the powers of courts and administrative authorities, regarding the settlement of the conflict and compensation of the harm caused, as well as the recourse to the Office of the Ombudsman.

Chapter VII deals with the way Albanian laws enable the individuals to benefit from the remedies provided in the laws. It analyses the legal capacity of individuals, as a requirement for having access to the procedures of recourses. It is focused particularly in the enforcement of courts' decisions, as an issue related to the ability of individuals to take advantage of the provisions that guarantee the protection of their rights from the illegal acts of state authorities.

The last part of the thesis presents conclusions on the features of the legal system of Albania with regard to the effectiveness of the remedies provided for violations of the Convention. This part points out the deficiencies and gaps that characterize Albanian legal system with regard to each of the components of the effectiveness, as identified in the previous chapters, and suggests ways these inadequacies can be addressed in the future.

CHAPTER I

HUMAN RIGHTS PROTECTION IN ALBANIA DURING THE COMMUNIST REGIME AND THE FEATURES OF ITS LEGAL SYSTEM

1.1 Introduction

The political and social factors, as they have evolved in the course of the Albanian history, have had inevitably a strong impact on the reformation of the legal system of the country. An analysis of the features of the legal system of a country cannot be complete without the examination of the historic developments that have affected the process of political transformation. Albania has undergone radical changes in the political, social and legal sphere in the last decade. The concept of human rights has also evolved significantly during these last years. This evolution has been reflected in the legal perception of human rights protection and has also affected the mentality of the people regarding the necessity of legal guarantees to protect their rights.

The aim of this chapter is to provide information on the background of human rights protection before the installation of the democratic system. Therefore, the following sections contain a brief overview of the Albanian legal system during the communist regime with special focus on the guarantees for the protection of human rights. It also describes the conceptual evolution of human rights in Albania after the establishment of the new democratic regime. Besides the historical factors, this chapter also introduces the principal features of the legal system of Albania.

1.2 Historical background

Albania belongs to that group of Eastern European countries whose political system has been isolated to the democratic principles of Western European countries for almost 45 years. It has probably suffered the most repressive dictatorial regime amongst the countries of the communist system. After the Second World War, a communist regime was established in Albania following the example of other East European countries. A new social order was legally instituted upon the adoption of the first communist Constitution in March 1946. This Constitution created *the state of the workers and labouring peasants*, and abolished all ranks and privileges based on position, wealth, or cultural standing.³ It sanctioned a regime of one-political party governance, thus forbidding expressly the establishment of other political forces. According to the Constitution of 1946, all citizens were equal, regardless of nationality, race, or religion.⁴ Actually, this equality remained only within the formal guarantees of this provision and it was never reflected in practice. The economy was organized based on the principle of communal property thus, forbidding by law the private property. At the political level, the whole system functioned on the principle of the centralization of the power. The external policy was characterized by a total isolation from the rest of the world as a “potential threat” to the country's independence, and a partial cooperation with the Eastern European countries where the same political system had been established.⁵

Within the framework of such a regime, the essence of the concept of human rights was completely rejected. The principle of the collectivity prevailed over the liberties of the

³ Alb Publishing Agency, *Albanian History*, available from <http://www.albania.co.uk/index.html>; Internet; accessed 17.06.2000.

⁴ *Albanian Constitution* 1949, Arts. 1-3.

⁵ *Supra* note 3.

individuals. In particular, the freedom of conscience, the right of expression and free religious were completely negated, and these restrictions served as legal grounds for persecuting and eliminating those who dared to express political views contrary to the ideology of the communist regime. The famous criminal provision against "agitation and propaganda" was very notorious for exterminating the smallest sign of deviation from the "red code" policy of the political party in power. Individuals accused to have committed the offense of "agitation and propaganda" were very often denied the right to a fair legal process, and in some cases were executed without a court decision.⁶ The private practice of law and the Ministry of Justice were eliminated in 1967, as "unnecessary." Although individuals accused of criminal behavior during the communist regime theoretically had the right to present a defense, they could not avail themselves of the services of a professional attorney.⁷

The Constitution of 1976 represents the maximization of the efforts to undermine democratic principles in general, and the essence of the concept of human rights in particular. This Constitution sanctioned a political system organized on the principle of the unity of the powers.⁸ It contained very few provisions dealing with human rights of the individuals. Most of them served only for a propagandistic and manipulative effect. Such was the case of article 53 that provided the rights of individuals to free speech, organization and peaceful assembly, while the exercise of any of these rights in practice was strictly controlled by the state institutions and no deviations from the communist ideology were tolerated.⁹

⁶ Albanian Center for the Protection of Human Rights, "Human Rights during Communism," *Human Rights Review*, Vol. 2, 1997, pp. 4-6.

⁷ US Library of Congress, *Country Study - Albania; Internal Security*, available from [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+a10130\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+a10130)); Internet; accessed 14.05.2000.

⁸ *Albanian Constitution* 1976, Arts. 1-3.

⁹ *Supra* note 3.

As regard the judicial system during this period, it was strongly controlled by the communist party in power and consequently, was unable to function independently.¹⁰ There were three court instances dealing with civil and criminal conflicts. The highest judicial organ was the Supreme Court, whose members were elected for a four-year term by the People's Assembly in a secret ballot. The Supreme Court consisted of a chairman, the deputies, and assistant judges. It rendered its decisions collegially. Officers of courts of the lower levels were elected in a similar manner by people's councils of the districts. Trials were generally open to the public and were often held in places of employment or in villages in order to make them accessible.¹¹ There was not such an instance as the Constitutional Court, where the individuals could challenge the constitutionality of laws or governmental decisions. The idea of protection of the constitutionality of the laws was in itself an inconceivable concept for the communist legal system. Although the Constitution formally recognized the right of the individuals to criticize and complain against the decisions of the public administration, there were no instances where the individuals could complain for violations of their rights by state authorities. The only way of challenging administrative decisions was through the administrative recourse.¹²

As a general rule, the provisions of the Constitution of 1976 did not recognize any legal or constitutional responsibility of the state for violations of the individuals' rights, because the state was considered as the source of these rights.¹³ Obviously, a totalitarian state could not accept the notion of human rights as natural rights deriving from human nature. In other words, individuals were afforded a protection of their rights not because of

¹⁰ Kondi Th., Chairman of the High Court, "Certain Aspects of the Application of International Human Rights Standards in the Constitutional Law of Albania," *Human Rights Law Review*, Vol. 1, Albanian Center for Human Rights Documentation, 1995, p. 41.

¹¹ US Library of Congress, *supra* note 7, "Country Profile."

¹² Kondi Th., *supra* note 10, at p. 41.

¹³ *Albanian Constitution 1976*, *supra* note 8.

the human nature, but because of the willingness of the state. Consequently the state had also the power to withdraw the protection of these rights at any time. Thus, the principle of accountability of the state for non-compliance with the substance of human rights was an unknown concept for the political and legal system of the communist regime.

During the period of 1989-1990, the communist government made some efforts to introduce some legal measures for improving the situation of human rights protection. Ramiz Alia' s regime took an important step toward democracy in early May 1990, when it announced its desire to join the Conference for the Security and Cooperation in Europe, introducing at the same time positive changes in the domestic legal system.¹⁴ In 1991 other legislative measures were taken by the communist government, which eased the persecution of religious practices and allowed some limited religious activities, liberalized the restrictions on the travel outside Albania, recognized the right to a fair trial and the right to information.¹⁵

As a result of the strong political movements inside the society, the government was obliged to take further steps toward the democratization of the society. So, upon the pressure of the students' revolts and widespread riots in the country, the communist government organized general elections in February 1991. A multiparty system was established for the first time after 45 years. In May 1991 an interim constitutional draft law was adopted, replacing the provisions of the Constitution of 1976.¹⁶ It introduced a political system with similar features to those of a parliamentary democracy. It also reflected a serious commitment toward the establishment of the principles of political pluralism, separation of powers, and international human rights protection. Initially, the constitutional provisions recognized the importance of human rights only as a principle. So, article 2 of the

¹⁴ US Library of Congress, *supra* note 7, at "Government and Politics. Human Rights."

¹⁵ Albanian Center for the Protection of Human Rights, *supra* note 6, at p. 6.

¹⁶ Law No. 7491, dated 21.05.1991, "On the Main Constitutional Provisions." Official Journal 1991, Vol. 4, p. 145. Hereafter referred as the "Constitutional Law."

Constitutional Law stated the obligation of the state to respect and protect human dignity, individuals' rights and freedoms, the free development of human personality, as well as, the constitutional order, the equality before the law, the social justice and pluralism.¹⁷ Moreover, article 4 of this Law provided that the Republic of Albania would recognize and guarantee human rights and fundamental freedoms of individuals and national minorities, as accepted by the international documents.¹⁸

Besides these two general statements, there were no concrete human rights' guarantees included in the provisions of the Constitutional Law. Obviously, it was a very poor regulation that could not stay in force for long. Two years later a constitutional amendment was adopted providing concrete guarantees for the protection of human rights of the individuals.¹⁹ Meanwhile, new laws were adopted for the implementation of the new constitutional principles, such as the civil law, civil procedure law, foreign investment law, criminal law, criminal procedure law, labor law, commercial companies law, financial law, as well as, other laws related to the land.

The institution of the legal counsel was reestablished in 1991, after the recognition of the legal profession as a free profession in the constitutional provisions.²⁰ In 1994, it was adopted the Law "For the Legal Profession in the Republic of Albania," which stated that in order to exert the profession of the advocate, a person should have a law degree and the

¹⁷ *Id.* at Art. 2.

¹⁸ In fact, the wording of this article was very imprecise. As it could be easily noted, it provided guarantees for the protection of the human rights in very broad and vague terms. There weren't any guarantees in the national level for the protection of the human rights accepted by all international documents. Perhaps, the right terms in this article would have been just: "recognizes" and not also "guarantees." Almost the same wording was used in article 8 of the same Constitutional Law, which stated that the legislation of the Republic of Albania considers, recognizes and respects the generally accepted norms of the international law. As it is clear, in this case the legislators did not find opportune to include the term "guarantees" in this article, but used instead the terms "considers, recognizes and respects."

¹⁹ Constitutional Amendment No. 7692, dated 31.03.1993, "On the Basic Rights and Fundamental Freedoms of the Individuals." Official Journal 1993, Vol. 3, p. 161. In more details the provisions of this law will be analyzed in chapter III.

²⁰ Law No. 7491, dated 21.05.1991, *supra* note 16, at art. 16.

respective advocate's license. According to this law that is still in force, the issuance of the advocate's license is conditioned upon the taking of a bar exam, but there could be exceptions to this rule for distinguished professionals.²¹ The law assigns the organization of the bar exam and issuance of the licenses to the Ministry of Justice. Also it requires that all licensed advocates be registered at the respective register of the Ministry of Justice. However, the law provides also the possibility of removal of the license by the Charring Council of the National Chamber of Advocates, upon the proposal of the Minister of Justice or the District Chamber where the advocate is a member.²²

Legislative measures in the national level were followed by engagements undertaken in the international level, some of which were legally binding. The acceptance of Albania in the Council of Europe, as a member with full capacities, represented another significant step toward a serious commitment in the field of human rights protection.²³ After the acceptance, Albania ratified the main instruments of the Council of Europe in the field of human rights protection, such as the European Convention on Human Rights and some of its protocols²⁴, the Framework Convention on the Protection of the Minority Rights, the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment etc.²⁵ The ratification of the most important international human

²¹ Law No. 7827, dated 31.05. 1994, "For the Legal Profession in the Republic of Albania," Official Journal 1993, Vol. 7, p. 346, at arts. 24-26.

²² *Id.* at arts. 31-32.

²³ Albania was accepted as a member of the Council of Europe in July 1995, after several years of a "special guest" status. This status was given to Albania in 25 November 1991, after the observation of the elections of 31 March and 7 and 14 April 1991, whose results were considered as satisfactory in terms of fairness and transparency. Albanian Center for the Protection of Human Rights, *supra* note 6, at p. 4.

²⁴ After the decision of the Constitutional Court of Albania, which abrogated the death penalty in 1999, Albania started the procedures for the ratification of Protocol Six of the Convention. ATA, Albanian Telegraphic Agency, *Daily News*, available from <http://www.ata-al.com/>; Internet; accessed in 14.06.2000.

²⁵ Council of Europe, *Treaties ratified by Albania*, available from <http://www.coe.fr/eng/legaltxt/ratstates/ratalb.htm>; Internet; accessed in 19.06.2000.

rights documents was finalized with the adoption of a new Constitution in 22 November 1998, through a nationwide referendum.

1.3 The basic patterns of the legal system

The Albanian legal system belongs to the Romano-Germanic legal trend or as otherwise known, the civil law system. As such, the decisions of courts are primarily based on the written laws, differently from the common law system. The features of the civil law system could be formally distinguished already at the time of establishment of the royal regime in September 1928.²⁶ The only official sources of the legal system of the royal regime were the written laws, most of which were codified following the example of French and Italian legal systems.²⁷

The communist legal system also had similar characteristics in terms of reliance only on the written laws. However, at that time, the judicial power, as well as the other two branches of power, were strongly controlled by the ideology of the communist party in power. In this sense, the judicial activity of Albanian courts during the communist regime was not a fully independent one, rendered in the name of justice. The real features of the civil law system became distinguishable only after the establishment of the democratic legal system. According to the new regulation, Albanian judges must rely solely on the written laws. In case of lack of regulation for a specific issue, it applies the so-called "analogy of the law," according to which the judges must refer to the legal regulation of an analogue

²⁶ Aleks Luarasi et al, *The History of the State and Law in Albania*, Vol. 2, (Shtëpia Botuese Luarasi, Tirana, 1997) at pp. 183-184.

²⁷ *Id.*, at pp. 201-205.

situation.²⁸ However, this principle is not applicable in the criminal proceedings. This is expressly stated in the *Albanian Criminal Code*, what reflects the well-recognized maxim *nullum crimen, nulla poena sine lege (scripta et praevia)*:

No one may be sentenced for an act, which is not already explicitly provided for by law as a criminal offense or contravention.

No one may be sentenced with a type and measure of punishment that is not provided for by law.²⁹

Despite the strict rule that judges must rely on the written laws there is an exception for the decisions of the High Court of Albania. This Court may interpret specific legal provisions with the purpose of unifying the practice in the respective area. Until recently, the status of these decisions was not clear. Practically, judges considered these interpretations as binding, given the gaps in laws and the fact that they were issued by the highest judicial authority, with the power to review the decisions of the lower courts. Formally this issue was not clearly determined. The *Constitution* of 1998 provides only that for the purpose of unifying or amending the judicial practice, the High Court may choose to review particular judicial cases in the joint colleges.³⁰ The article does not say more with regard to the binding effects of these decisions. In May 2001, Albanian Parliament amended article 438 of the *Albanian Criminal Procedure Code* adding the following provision:

The decisions of the Joint Colleges of the High Court are binding for lower courts in the adjudication of similar cases.

However, the High Court has only the power of interpreting laws that apply to a certain type of conflict with the aim of unifying the practice of courts in the respective area of issues. It does not have the power to abrogate or amend laws. This is exclusively under the authority

²⁸ Luan Omari, *Principles and Institutions of the Public Law*, (Botimet "Elena Gjika," Tirana, 1993), at pp. 164-165.

²⁹ *Albanian Criminal Code*, at art. 6.

³⁰ *Albanian Constitution* 1998, at art. 141.2.

of the Albanian Parliament, except, as explained above, for issues of unconstitutionality, in relation to which, the Constitutional Court may strike out a law as unconstitutional.

According to the provisions of the Constitution, the normative acts that are effective in the entire territory of the Republic of Albania are:

- a. the Constitution;
- b. ratified international agreements;
- c. statutes;
- d. normative acts of the Council of Ministers and local government.³¹

Administrative acts that are issued by the organs of local government are effective only within the territorial jurisdiction of these organs.³² Normative acts of ministers and other institutions of the central government are effective within the sphere of their jurisdiction in the entire territory of the Republic of Albania. Besides the written laws, there exist also rules of customary law, which still to this day hold sway in certain regions of the country. These customary rules are not recognised as having a binding force, except when sanctioned in laws. In this case, the substance of the customary norms must be recognized the effects of law by Parliament.³³

The principal source of the customary rules is the so-called 14th century *Code of Lekë Dukagjini*³⁴ that regulates different aspects of the life in a community, but is particularly noted for the harsh rules that it imposes in cases of murder and property rights. According to

³¹ *Id.*, at art. 116.

³² *Id.*, at art. 116/1, 2.

³³ Luan Omari, see note 28, at p. 181.

³⁴ Lekë Dukagjini, was a combatant of the army of the Albanian national hero, Gjergj Kastrioti Skenderbeu, and he is credited with the establishment of the rules of this Code in the 14th century. However, the written version of the Code is attributed to a Franciscan monk, Shtjefën Kostandin Gjeçov. Despite this, the Code retained the name of Lekë Dukagjini, as the person who conceived the rules of the Code. Aleks Luarasi et al, *supra* note 26, at pp. 6-7.

the harsh rules of the blood feud, until revenge is obtained, males are forced to stay locked in special places during the daylight hours. The Code has still a considerable application in the mountainous north of the country, where the blood feud between families has become a very spread phenomenon.³⁵ However, the application of the customary rules in many occasions does not remain faithful to the written version of the Code since it is considered as being incomplete. Consequently it is easily modified in practice. Despite of the measures of different social organizations to reduce the effects of the customary rules with regard of revenge in cases of murder and property conflicts, the rate of crimes committed for blood feud reasons has increased significantly.³⁶

1.4 Conclusion

During the communist regime, Albanian citizens had few guarantees for the protection of human rights and fundamental freedoms. The work of the three branches of the state power reflected strongly the supremacy of the state over the individuals. Consequently, the panorama of human rights protection in Albania during the communist regime appears very dark. The recognition of an individual space as inviolable by the state is attributed to the change of regime at the beginning of 1991. The state finally acknowledged its obligation to protect the basic human rights stated in the constitutional provisions, as the highest legal norms of the country, as well as in the ratified international treaties and ordinary laws. However, this process is only at the beginning stage. The proper implementation in practice of the human rights guarantees presents more difficulties than the process of reformation of

³⁵ Albanian Helsinki Committee, Reports on the Activities of the Albanian Helsinki Committee, Vols. 1998-1999.

³⁶ *Id.*

the written laws. At the end of the day, the results of this process of reformation in practice would make the difference with the previous regime.

CHAPTER II

THE CONCEPT OF EFFECTIVE REMEDIES AS INTERPRETED BY THE EUROPEAN COURT OF HUMAN RIGHTS

2.1 Introduction

Article 13 is one of the most complex and troublesome provisions of the Convention. According to two judges of the European Court, it is one of the "*most obscure*" clauses in the Convention, whose analysis has been avoided by its institutions for approximately two decades, for the most part advancing barely convincing reasons.³⁷ As opposed to the other articles of the Convention, it does not contain a substantial human right in the meaning of the rights provided by the other articles. Basically, it requires the states that have ratified the Convention to provide effective remedies for the violations of any of the substantial rights of the Convention. Said in other words, this article provides guarantees for the protection of the individuals' rights as stated in the other articles.

The implementation of article 13 in practice has shown that it entails a complexity of issues, most of which deriving from the way the article is worded.³⁸ Nevertheless, although not along very consistent lines, the case law of the European Court and the European Commission³⁹ has identified the main principles regarding the requirements for a proper

³⁷ Dissenting opinion of judges Matscher and Pinheiro Farinha in the case of *Malone v. United Kingdom*, Judgement of August 1984, Series A, No. 82, EHRR, p.41.

³⁸ Art. 13 provides:

Everyone whose rights and freedoms as set forth in this Convention are violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

³⁹ Although upon the entry into force of Protocol 11 of the Convention, the European Commission has ceased performing its functions at the stage of admissibility of the individuals' complaints, its interpretations regarding different aspects of article 13 will be taken into consideration.

application of article 13. These principles could be based upon for the analysis of national features with regard to the application of article 13.

This chapter aims to provide an analysis of the guidelines regarding the rules of implementation of article 13, which will be based upon for the analysis of the features of the Albanian legal system. It outlines the key components of the notion of effective remedies, based on the interpretations of the European Court and the European Commission in the relevant cases, as well as the assessment of the elements of effectiveness by some of the most distinguished legal scholars in the field. It also points out issues related to the application of article 13 that need further clarification by the European Court.

2.2 The rules of applicability of article 13

During the course of their activity, the European Court and the European Commission have been faced with different aspects of article 13 to be interpreted. These perplexities have shown that its provision entails many lacunae, which become more problematic in the phase of implementation. A question that has been very often raised in practice relates to the possibility of fulfilling the requirements of this provision if the Convention is not part of the domestic law of the contracting states. The rule laid down by the European Court in this regard is that a proper implementation of article 13 does not require the incorporation of the Convention in the domestic law. According to the European Court's interpretation in *Swedish Engine's Drivers Union v. Sweden*, the application of article 13 in a given case depends upon the manner in which the contracting state concerned has chosen to discharge its obligations under article 1 of the Convention, directly to secure to anyone within its jurisdiction the rights

and freedoms set out in section 1.⁴⁰ The same is argued in *Silver and Others v. United Kingdom*.⁴¹ Therefore, local remedies provided for the claims of violations can still meet the criteria of effectiveness required by article 13, although the Convention may not be part of the domestic laws. However, there are also adverse opinions regarding this matter. Some legal scholars sustain the idea that the way article 13 is worded implies that it is a prerequisite that the Convention be incorporated in the domestic law. Thus, according to Prof. Buergenthal, the real significance of the Convention derives from the fact that by adhering to it, the High Contracting Parties assumed two interrelated obligations: they undertook to implement the Convention within their respective jurisdictions to make it part of their domestic law, and they pledged that an aggrieved individual shall have “an effective remedy before the a national authority” to enforce the rights guaranteed in the Convention. The same is argued by Golsongs, who sustains the idea that the best way to cope with the requirements of article 13 is to incorporate the Convention in the domestic law.⁴²

Despite these opinions, the European Court seems to be firm on the choice of non-incorporation of the Convention. However, this choice does not entitle the states to provide protection for as many human rights as it is convenient for them. It is necessary or, better obligatory under the terms of article 13 that individuals be enabled to receive remedies for human rights that in nature are equivalent to the rights provided in the Convention. As the European Court argued in *Soering v. UK*, although it is not a prerequisite of article 13 that states make the Convention part of their domestic laws, national laws should however

⁴⁰ *Swedish Engine's Drivers Union v. Sweden*, Judgment of 6 February 1976, Series A, No. 20, 1 EHRR, p.617.

⁴¹ *Silver and Others v. United Kingdom*, Judgment of 25 March 1983, Series A, No. 61, 5 EHRR, p. 347.

⁴² Buergenthal T., *The Domestic Status of the European Convention on Human Rights: A Second Look*, 7 Journal of ICJ (1966), 55-96, p. 59; Golsongs H., *Les Recours des Individus devant les Instances Nationales en cas de Violation du Droit European*, Colloquium organized by l' Institut d'Etudes Europeenes, Brussels, 24-5 April 1975, (1978), 59-83, as both quoted in. Z. Drzemczewski A., *European Convention on Human Rights in Domestic Law. A Comparative Study*, Clarendon Press, Oxford, 1983, p. 46.

provide guarantees that are in substance equal to the rights that are included in the Convention.⁴³

Since article 13 refers to the rights provided under the other articles of the Convention, it is considered as having a sort of subordinate status. In other words, the invocation of this article before the European Court is conditioned by the claims of violation of any of the rights guaranteed under the other articles of the Convention. However, it is not necessary for article 13 to apply that individuals prove that a violation has already been established by a national authority, since in that case they would have had already an effective remedy before a national authority.⁴⁴ The European Court has argued that even in those cases where the individuals *claim* that their rights under the Convention have been violated, article 13 should apply. Thus, in *Klass and Others v. Germany*, the European Court argued:

This provision read literally seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However a person cannot establish a "violation" before a national authority unless he is first able to lodge with such authority, a complaint to that effect. Consequently, as the minority of the European Commission stated, it can not be a prerequisite for the application of article 13 that the Convention be in fact violated. Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority both to have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated.⁴⁵

This interpretation however is valid only for claims that pass the threshold of the arguability. It is now firmly established that, only the claims that are deemed arguable would qualify for an effective remedy analysis under article 13. The test of arguability has been assessed by the European Court in all the cases that have raised the issue of violation of

⁴³ *Soering v. UK*, Judgment of 7 July 1989, Series A, No. 161, 11 EHRR, p. 439, para. 121.

⁴⁴ P. van Dijk, G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd edition, Antwerp, Boston, London, Frankfurt, Kluwer Law and Taxation Publishers, 1990, p. 521.

⁴⁵ *Klass and Others v. Germany*, Judgment of 6 September 1978, Series A, No. 28; (1979-80) 2 EHRR, p. 214, para. 64.

article 13. This test was firstly applied in the case of *Silver and Others v. Sweden*, where the European Court held that an individual is entitled to effective national remedies, both to have his claim decided, and obtain redress, if he has an arguable claim to be the victim of a violation of the rights set forth in the Convention.⁴⁶ However, there is not yet too much clarification on the notion of arguability by the European Court. It has maintained that it should not give an abstract definition of the concept of arguability of a claim, but this must rather be determined in light of the particular facts of the case and nature of the legal issue raised.⁴⁷ The European Commission has elaborated more than the European Court on the issue of the indicators of the arguability of a claim. According to its interpretation, a claim is arguable, if it contains facts raising reasonable doubts about the alleged violation. It has defined the followings as the criteria of the arguability of a claim:

a-it should concern a right or freedom guaranteed by the Convention;

b-the claim should not be wholly unsubstantiated on the facts;

c-the claim should give rise to a *prima facie* issue under the Convention.⁴⁸

In order to pass the threshold of the arguability, a claim must comply with the three elements. The arguability test is very often analyzed together with the test of the manifestly ill-foundedness of the claim. According to the procedural rule of the former article 27 of the Convention⁴⁹, the test of the manifestly-ill foundedness of a claim involved an examination by the European Commission of the factual and legal basis of the claim, from which it could decide on the admissibility of the claim. According to the European Court's interpretation in the case of *Boyle and Rice v. UK*, although in the ordinary meaning of the words it is difficult

⁴⁶ *Silver case*, *supra* note 41.

⁴⁷ *Boyle and Rice v. United Kingdom*, Judgment of 27 April 1988, Series A, No. 131, 10 EHRR 425.

⁴⁸ Op. Com., App. Nos. 9659/82 and 9658/82, 7 May 1986, Digest of Strasbourg Case-Law Related to the European Convention on Human Rights, Update to Vol. 4, Article 13-25, Carl Heymanns-Verlag K G K Köln, Berlin, Bonn, München, 1995, p.12

⁴⁹ Before the entry into force of Protocol 11.

to conceive how a claim that is manifestly ill-founded can nevertheless be arguable, a claim can be manifestly ill founded but still an arguable claim. Thus, the rejection of a complaint as manifestly ill-founded amounts to a decision that, there is not even a *prima facie* case against the respondent state. However, the European Court considered itself competent to take cognizance of all questions of fact and of law arising in the context of the complaint under article 13, including the arguability or not of the claims of violation of the substantive provisions. In this regard, the Commission's decision on the admissibility of the underlying claims and the reasoning therein, whilst not being decisive, provides significant pointers as to the arguable character of the claims for the purposes of article 13.⁵⁰

Another important conclusion, deriving from the case law of the European Court, relates to the nature of the national authorities that are formally responsible for dealing with the claims of the citizens and affording remedies. In *Klass* case, the European Court held that the authority referred to in article 13 might not necessarily in all circumstances be a judicial authority in the strict sense. Nevertheless, the powers and procedural guarantees that an authority possesses are relevant in determining whether the remedy before it is effective.⁵¹ This conclusion relates also to the interpretation of the European Court with regard to the former article 26's rule under the Convention, providing that local remedies do not relate only to judicial remedies but also to administrative proceedings, if they can influence the situation created.⁵² Thus, it is sufficient that the administrative authorities be able to make a decision on the individuals' complaint and repair the harm occurred. Consequently, the lack of judicial remedies in the local level would not amount to a violation of article 13, if administrative recourses may redress the violation committed.

⁵⁰ *Boyle and Rice* case, *supra* note 47, at para. 54. See also *Plattform Artze für das Leben v. Austria*, Judgment of June 1988, Series A, No. 139, p.12, para. 27.

⁵¹ *Klass* case, *supra* note 45, at para. 67.

⁵² Application No. 2749/66, Yearbook IX, p.410, Application No. 4451/70, Yearbook XIV, p. 442.

Other limits to the concept of remedies have been established with regard to the “immunity” of the national laws. In *Leander v. Sweden*, the European Court argued that article 13 does not guarantee a remedy allowing a contracting state’s law as such to be challenged before a national authority on the grounds of being contrary to the Convention or equivalent legal norms.⁵³ This interpretation is also considered as a limit that is imposed on the concept of “*persons acting in an official capacity*.”⁵⁴ Thus, according to the European Court these terms do not include the national legal norms. Although it sounds logical to argue that laws may violate the rights of individuals the same way as the actions of state bodies, there are no obligations for the states to provide remedies of this sort under the terms of article 13.

Finally, the European Court has been inclined to accept the process of judicial review as meeting the criteria of effectiveness of remedies under the terms of article 13. This issue is of a certain complexity in Great Britain, where courts may take binding decisions on the administrative acts only in specific cases, such as when the irrationality of these decisions is proved. However, in *Vilvarajah and Others v. UK*, the European Court found the judicial review proceedings to be an effective remedy in relation to the applicants’ complaint. The Court was satisfied with the fact that English courts could dismiss an administrative decision, on the grounds that the decision is tainted with irrationality, irregularity or illegality.⁵⁵ However, in another case, the Court considered the same powers of English courts with regard to judicial review proceedings, as insufficient in terms of effective remedies. In *Chahal v. UK*, the European Court found that the powers of English courts to review the decisions of Home Secretary only on the grounds of illegality, irrationality, or procedural

⁵³ *Leander v. Sweden*, Judgment of 26 March 1987, Series A, No. 116, 9 EHRR 433, para. 77. See also *James and Others v. UK*, Judgment of 21 February 1986, Series A, No. 98, 8 EHRR, p. 123, para. 87.

⁵⁴ P. van Dijk, G. van Hoof, *supra* note 44, at p. 527.

⁵⁵ *Vilvarajah and Others v. UK*, Judgment of 30 October 1991, Series A, No. 215, 14 EHRR 248, para. 121.

impropriety amounted to a violation of article 13.⁵⁶ The decision of the Court in this case was conditioned by the nature of the right involved, namely the right against torture, or inhuman, or degrading treatment, or punishment. As the Court argued, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance the Court attaches to article 3, the notion of an effective remedy under article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3. Consequently, since English courts could not perform such a scrutiny, there was a violation of article 13.

The different assessments of judicial review proceedings in the above two cases are obviously due to the restricted jurisdiction of British courts in these proceedings. However, the arguments of the European Court in the *Chahal* case show that the approach taken with regard to the powers of courts in judicial review proceedings is flexible upon the nature of the right involved. Although, generally the judicial review proceedings are considered sufficient for complying with the requirements of article 13,⁵⁷ even in the case of British courts, the interpretation established in the *Chahal* case may be based upon in cases, where rights of the same nature as the right against torture or inhuman treatment are involved.

As regards the last words of article 13, namely “notwithstanding that the violation has been committed by persons acting in an official capacity,” there is still not a clear position of the European Court with regard to its intention. Academic interpretations of this provision also vary. Some authors have interpreted its wording as meaning that it should apply to private intrusions as well as to public ones. According to Raymond, article 13 obliges the states to provide remedies in the domestic law against violations committed by private

⁵⁶ *Chahal v. UK*, Judgment of 15 November 1996, Series A, Reports 1996-V, paras. 151-153.

⁵⁷ *Soering case*, *supra* note 43.

individuals or public authorities.⁵⁸ However, there are also opinions that do not support the individual effect of article 13, but interpret it from another point of view. Such opinions sustain the idea that the final words of article 13 intend merely to emphasize that public authorities are not immune from responsibility in the event that they interfere with one of the articles of the Convention.⁵⁹ The main thesis in support of this approach is that the Convention contains obligations for non-violation of its provisions only for the states that have ratified it, thus excluding private subjects. If such obligations were to be accepted, the state could be held responsible under the provisions of the Convention for every ordinary crime committed against the life, property etc. of its citizens. However, the European Court seems to have recognized the responsibility of the states where they have failed to take positive measures regarding the protection of some of the rights of the Convention from private interference.⁶⁰ In *Platform Artze für das Leben v. Austria*, the Court argued that in the case of a genuine right such as the freedom of peaceful assembly, the state cannot merely refrain from interference. Failure of the state to take measures to guaranty the enjoyment of this right in practice would amount to a violation of the Convention.⁶¹ Generally, it could be argued that, from this point of view, the responsibility of states applies to the extent that they have not taken the necessary measures to prohibit violations of the rights protected in the Convention from any kind of interference, public or private.

⁵⁸ Raymond Jay, A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights, *V HR Rev.*, 1980, p. 170.

⁵⁹ Gomien D., J. Harris D., Zwaak L., Law and practice of the European Convention on Human Rights, Council of Europe Publishing, 1996, p. 336. Jacobs and White, The European Convention on Human Rights, Clarendon Press Oxford, 1996, p. 339.

⁶⁰ *X and Y v. Netherlands*, Judgment of 26 March 1985, Series A, No. 91, 8 EHRR. 235, *Marcx v. Belgium*, Judgement of 13 June 1979, Series A, No. 31, 2 EHRR. 330, *Young James and Webster v. UK*, Judgement of 18 October 1982, Series A, No. 55, 5 E.HRR 201, *Costello Roberts v. UK*, Judgement of 1993, Series A, No. 247-C, 19 EHRR 112.

⁶¹ *Platform Artze für das Leben* case, *supra* note 50, at para. 32.

2.3 The components of effectiveness

Since article 13 requires explicitly that the national remedies be effective, a right interpretation regarding the requirements of effectiveness is of a significant importance. One of the most elaborated syntheses on the components of effectiveness has been developed by the authors Harris, O'Boyle and Warbrick. Such a synthesis expresses very clearly the criteria that apply to the concept of effectiveness. Obviously, it embodies a summary of the interpretations of the European Court in the cases that have alleged a violation of article 13. Taking into account the fact that the European Court has outlined rules and limitations to the concept of effectiveness rather than a definition of this term, the above authors have the merit of developing these interpretations into a systematic schema of components of effectiveness, envisaging all aspects of the requirements of article 13. Thus, they have identified four elements of effectiveness:

- a) Institutional effectiveness;
- b) Substantive effectiveness;
- c) Remedial effectiveness;
- d) Material effectiveness.⁶²

The first component, as it could be easily deduced from its name, relates to the position of the decision-making authorities that are in the position to afford remedies for the violations claimed to have been committed. This component requires that these authorities be sufficiently independent of the authority alleged to be responsible for the violation of the Convention. If the authority that receives the complaint is not independent from the one that

⁶² J. Harris D., O'Boyle M., and Warbrick C., Law of the European Convention on Human Rights, London, Dublin, Edinburgh, Butterworths, 1995, p. 450.

has allegedly committed the violation, it will not be in the position of making a fair judgment, since it will be under the influence of the authority that took the challenged decision.

The above definition is largely reflected by the case law of the European Court. Thus, in the *Leander* case, the European Court argued that the Chancellor of Justice and the Parliamentary to whom the complainants could complain, were both independent from the Government whose decision was challenged, thus would have qualified as effective remedies if they had binding powers.⁶³ Also in the *Silver* case, the Court argued that the recourse to the Home Secretary, with regard to the validity of the order or instruction issued by himself, could not be considered to have a sufficiently independent standpoint to satisfy the requirements of article 13, since as the author of the directives in question, he would in reality be a judge in his own cause.⁶⁴

As regard substantial effectiveness, it refers to the interpretation of the European Court with regard to the option of incorporating the provisions of the Convention into the domestic laws. Basically, it presupposes the possibility of the individuals to canvass the substance of the Convention, although the Convention may not be part of the domestic laws. In *James and Others v. UK*, the European Court argued that although the Convention was not part of the domestic law, the respective legislation, including its effects on the applicant's case was compatible with the substantive provisions of the Convention and its Protocols.⁶⁵ Thus, if the constitutional or ordinary laws contain the same guarantees as if the Convention was part of the legal system, this would be sufficient for satisfying the requirements of substantive effectiveness. According to Harris et al. even in case the Convention is incorporated into the domestic laws, there still exist possibilities of violating the requirements of article 13. This may happen for example, in case the Convention is lower than the

⁶³ *Leander* case, *supra* note 53, at para. 84.

⁶⁴ *Silver* case, *supra* note 41, at para. 116.

domestic laws in the hierarchy of legal norms, and consequently the application of its provisions may be easily superseded.⁶⁶

The third component requires that if the applicants' substantive arguments are accepted by the national authority that is responsible to deal with their claims, the latter must be in the position to grant them a remedy. Basically, this means that national authorities should not only be able to deal with the case, but have also the powers to take decisions that can affect the situation created as a consequence of the violation. In *Campbell and Fell v. UK*, the European Court considered the powers of the Parliamentary Commissioner not effective from the point of view of remedies, since they were limited to submitting reports to the Parliament.⁶⁷ Also, in the *Leander* case, the recourses to the Chancellor of Justice and Parliamentary Ombudsman were not considered effective since their decisions could not have a binding effect.⁶⁸

Finally, the last component of effectiveness requires not only the availability of effective remedies in the national legal system, but also the possibility of taking advantage of these remedies. Basically, this component presupposes the compliance between the theoretical guarantees and the benefits in practice. In other words, a remedy that would remain within the formal stipulations of a law, without the possibility of being acted upon, would not be considered as effective for the purposes of article 13. For example, the lack of recourses for the parents of a minor with limited legal capacities, for bringing legal actions in courts on her behalf was considered by the European Court as a lack of effective remedies.⁶⁹

⁶⁵ *James and Others* case, *supra* note 53, at para. 86.

⁶⁶ *Harris et al.*, *see* note 62 at p. 451.

⁶⁷ *Campbell and Fell v. UK*, Judgement of 28 June 1984, Series A, No. 80, 7 EHRR, 165.

⁶⁸ *Leander* case, *supra* note 53.

⁶⁹ *X and Y v. Netherlands*, *supra* note 60.

Although it sounds very demanding, in order to be considered effective, a national remedy should comply with the requirements of each of the four components. However, these requirements are submitted to further modifications. Thus, in certain cases the European Court has modified the terms "remedies" into "an aggregate of remedies," for the sake of effectiveness. In those legal systems, where one single remedy could not satisfy the requirements of article 13, but the aggregate of the means provided for redress could do so, the European Court has been prepared to accept them as satisfying the requirements of article 13.⁷⁰ This conclusion relates to the reasoning that those aspects of the complaint that are not covered by one particular procedure of recourse, may be addressed by following other channels of recourses available at the domestic level.

However, it should be admitted that it appears difficult to imagine in practice components of recourses that in aggregate will satisfy the requirements of effectiveness, as long as there are no rules as to how these components should complement each other. Also, it appears that the notion of the aggregate of remedies very often includes recourses to authorities with non-binding powers, such as the Ombudsman or the Chancellor of Justice.⁷¹ It sounds difficult to accept that recourses to these authorities would increase the effectiveness of the recourses to authorities whose decisions are binding, if applied as an aggregate. In fact, the approach of the European Court with regard of the aggregate of remedies has been criticized for virtually nullifying the effects of article 13.⁷²

Furthermore, the effectiveness of remedies is not affected by the uncertainty of the favorable outcome.⁷³ The European Court has consistently maintained that in order to comply

⁷⁰ *Leander case*, *supra* note 53, at para. 84.

⁷¹ *Silver case*, *supra* note 41.

⁷² van Dijk, P., van Hoof, G., *supra* note 44, at p. 531.

⁷³ *Soering case*, *supra* note 43, or *Observer and Guardian v. UK*, Judgment of 26 November 1991, Series A, No. 216, para. 76.

with article 13, the possibility to address a complaint before different national instances is sufficient and is not affected by the unsuccessful outcome of the complaint.⁷⁴ Simply put, this means that although the available local recourses may not resolve the case in favor of the plaintiffs, it does not mean that they are not effective. This argument sounds fair and reasonable.

Finally, it appears that the concept of effectiveness does not depend only on the type of legal recourses available at the national level, but also by the nature of the rights involved in a concrete case. So, in cases, where the restriction of any of the substantial rights of the Convention is made for special interests such as the national security, the concept of effectiveness has been narrower than in other cases. In the *Klass* case, the applicants complained a lack of effective remedies for not being able to contest secret surveillance measures imposed on them for the sake of national security, since they were informed on these measures only upon their termination. The European Court responded that the requirements of effectiveness had to be read in the context of the concrete complaint. An effective remedy in respect of secret surveillance means a remedy that is as effective as it could be having regard to the restricted scope for recourse inherent in any system of secret surveillance. It was argued that the very nature of secret surveillance measures precluded prior notice of the potential violation of the right to privacy, but however, the availability of various legal remedies upon the notification of the termination of these measures was sufficient for complying with article 13.⁷⁵

On the other hand, it seems that the requirement of a remedy that is “as effective as can be” is not appropriate in respect of a complaint that a person’s deportation will expose him or her to a real risk of treatment contrary to article 3, where the issues concerning

⁷⁴ *Boyle and Rice* case, *supra* note 47, at para. 78.

⁷⁵ *Klass* case, *supra* note 45, at para. 65.

national security are immaterial. This is what the European Court concluded in *Chahal* case.⁷⁶ Consequently, it could be argued that the “influence” of the interest of national security on the effectiveness of local remedies is flexible, depending on the nature of the substantial right involved in the concrete case.

2.3 Conclusion

Despite certain doubts and inconsistent interpretations, the principal elements of the provision of article 13 are already established by the case law of the European Court and the European Commission. However, it should be admitted that the guidelines provided by this practice speak more about what article 13's provision *does not* require from the states in order to comply with it, rather than about their obligations regarding the compliance with it. The same could be noted also with regard to the concept of effective remedies, although the criteria for evaluation of this concept are clearer than the rules governing other aspects of article 13. This is also due to the academic commentaries on the subject. The great flexibility of the identified rules of application of article 13 would inevitably restrict the conclusions regarding the compatibility of the requirements of this article with the local remedies provided.

However, it is also true that due to the recognition of broad discretionary powers to the states with regard to the local recourses provided for possible claims of violations of the Convention, the European Court has been inclined to compromise with the range of remedies already existing in the local level. Consequently, besides the principal rules established with regard to the requirements of the implementation of article 13, the inherent features of the

⁷⁶ *Chahal v. UK*, *supra* note 56, at para. 150.

respective legal system of states seem to be the ultimate criteria for the assessment of the effectiveness of local remedies.

CHAPTER III

THE MAIN FEATURES OF THE CONSTITUTIONAL, JUDICIAL AND ADMINISTRATIVE SYSTEM IN ALBANIA

3.1 Introduction

The constitution, as the basic document of the functioning of a state, is a reflection of the national aspirations of the respective society as expressed in the political, social and the legal system. This is especially true for the system of protection of human rights, since the guarantees against the violation of the basic rights of the individuals are usually an integral part of the constitution of a country. Upon the establishment of the new democratic regime in 1991, the entire Albanian legal system underwent substantial changes, which were the *sine qua non* of the reconstruction of the new social and political order.⁷⁷ The constitutional provisions, as the supreme laws of the country and the basis of the political, legal and social structure, were the firsts to go through the process of reformation.⁷⁸ As already mentioned in chapter I, in 1991 Albania adopted a constitutional regulation that was different to the previous one. This constitutional regulation, although not sufficient and adequate, guided the country for several years until the adoption of a proper Constitution in 1998.

This chapter aims to introduce the readers with the standards of Albanian constitutional provisions, as the keystone of the whole legal system of the country. It focuses on the characteristics of the constitutional regulation in terms of human rights guarantees,

⁷⁷ Carlson S., *A Study of the Judicial System in the Republic of Albania*, Soros Foundation, Legal Resource Center, 1997, p. 5.

⁷⁸ The first Constitutional Law was adopted only one month after the establishment of a multiparty political system. See note 16.

status given to the international law in the domestic level, and particularly the range of local recourses available to the individuals in cases of violations of their rights. It also describes the main features of the judicial and executive system, as the principal authorities whose activity is directly related to the enforcement of the rights of individuals.

3.2 The type of the Constitution

Since the establishment of the socialist regime in Albania, two socialist constitutions have been adopted, sanctioning more or less the same rules of governance. The first communist Constitution was adopted in 1946. It was abrogated by the Constitution of 1976 that remained in force until 1991.⁷⁹ Both Constitutions were structured in several parts dealing with the main principles of the communist regime and the activity of the state structures. After 1990, a new type of constitutional regulation was introduced. Instead of a unique Constitution, a package of constitutional laws guided the country for almost 8 years. The first constitutional law adopted in 1991, namely the Law "On the Main Constitutional Provisions," at the time of enactment, contained only four chapters.⁸⁰ The first chapter defined the form of the regime (a Parliamentary Republic), and the main principles upon which was based the state structure. The second chapter provided the supreme organs of the state power, (the Parliamentary Assembly, and the President of the Republic). The third chapter contained provisions dealing with the supreme bodies of the public administration, (the Council of Ministers and the Judicial System), while the fourth chapter provided the procedures for amending the constitutional provisions, as well as some transitory provisions

⁷⁹ International Constitutional Law, Country Index: Albania, available from http://www.uni-uerzburg.de/law/al_idx.html; Internet; accessed in 08.05.2000.

on the abolishment of the old Constitution of the Socialist Republic of Albania adopted in 1976.⁸¹ Later on, the provisions of the Constitutional Law have been amended by three other constitutional laws, which brought the total of the constitutional laws to four. The initial idea was that this package of constitutional laws would function temporarily till the enactment of the new Constitution, which was supposed to be adopted within 1 year from the entry into force of the Constitutional Law. Between 1991 and 1998, several efforts to adopt a proper Constitution failed. Several constitutional drafts of the government and opposition dated January 1993, October 1994, and February 1995 failed to pass. The constitutional draft of October 1994 was rejected by a nationwide referendum held in 6 November 1994, while the other two drafts did not find the political consensus for being discussed in Parliament.⁸²

The new Constitution was adopted only in 1998. Similarly with the old regulation, the new Constitution is structured in several chapters dealing with the functioning of the main institutions of the state, such as the President of the Republic, the Parliament, the Council of Ministers, the Local Government, the People's Advocate, the Judiciary System, etc. The most important values and principles of the democratic governance, such as the protection of human rights and fundamental freedoms and the application of international treaties are also regulated. In general, the new constitutional regulation is much more advanced and comprehensive than the old package of the constitutional laws, as far as structure, systematization and subject regulation are concerned. As it will be shown in the next part, the time factor helped for a better perception of the concept of human rights and role of state with regard to their protection.⁸³

⁸⁰ Constitutional Law No. 7491, dated 21.05.1991, *supra* note 16.

⁸¹ *Id.*

⁸² International Constitutional Law, *supra* note 79.

⁸³ A special Commission, composed of representatives of the main political forces, was established for the exclusive purpose of drafting the articles of the Constitution. Experts of the Council of Europe and other international organizations assisted in the drafting of the chapter dealing with the human rights and freedoms of

3.3 Human rights guarantees within the framework of the provisions of the Constitutional Law and the Constitution of 1998

The first set of human rights provided in the constitutional amendment of 1993⁸⁴ was very similar to the articles of the Convention. It could be even noticed that some of the articles of this constitutional amendment were a pure translation of the respective articles of the Convention. The amendment provided the basic civil and political rights of individuals such as the right to life, the right against torture, the freedom of expression, conscience and religion, the right to organization, the right to peaceful assembly, the freedom of movement, the right to strike, the right to a fair trial, the right to vote and to be elected, etc..⁸⁵ There were also some economic and social rights included in this chapter, such as the right to employment, insurance and social assistance, the right to health care by the state, the right to marriage and to establish a family, etc.. However, the translation of the articles of the Convention and their incorporation into the constitutional laws, without a further harmonization with the rest of the provisions, caused conflicts between some of the articles. This was the case of the right to free expression, which, according to article 41 of the Constitutional Law, could not be limited even in case of a state of national emergency or war. At the same time, article 2 of the same law provided a definition of the right to free expression and it stated that it could be restricted in special circumstances.⁸⁶ This conflict between the two provisions was brought before the Constitutional Court for a final decision

the individuals.

ACCAPP, Newsletter of September 1997 at <http://www.geocities.com/Eureka/Enterprises/5434/newsletter.htm>.

⁸⁴ Constitutional Amendment No. 7692, dated 31.03.1993, *supra* note 19.

⁸⁵ *Id.* at arts. 1-40.

⁸⁶ *Id.* at art. 2.

on their compatibility only in 1997. The Constitutional Court resolved the case in favor of the limitations imposed on the right to free expression by article 2.⁸⁷

As regard remedial recourses, article 13 of the Constitutional Law, entitled "The Right to Appeal", stated the right of everyone to appeal against a court judgment to a higher court level established by law.⁸⁸ From the way it is formulated, article 13 seems to imply that the right to appeal could be exerted only for judicial decisions. However, article 14 stated that the individuals who had suffered a *wrongful administrative* or judicial decision, had the right of rehabilitation and compensation, in accordance with the rules of law, what implies that administrative decisions could also be found in violation of the individuals' rights protected by law. Obviously, these administrative decisions would be found to be "wrongful" only by higher administrative authorities, what suggests that they as well could be challenged as in violation of the individuals' rights. Thus, the provision of article 14 was a sort of remedial guarantee at the constitutional level for individuals' complaints.

On the other hand, as it may be easily deduced from the wording of article 14, the right of individuals to get remedies was related to the violations committed either by judicial or administrative authorities. This is related to the fact that at the time of this regulation only these two bodies could take binding decisions, which could eventually affect individuals' rights.

As regard the relationship between the national and international law, the provisions of the old constitutional laws were not very clear on the issue of the status of the international law in the domestic law. One article of the Constitutional Law stated that the Constitutional Court had the power to decide on the compatibility of the international treaties signed by the

⁸⁷ Decision No. 14, dated 29.05.1997, Official Journal 1997, Vol. 7, p. 174.

⁸⁸ Constitutional Law No. 7491, dated 21.05.1991, *supra* note 16.

Republic of Albania with the Constitution before their ratification.⁸⁹ According to the doctrinal interpretation, this regulation provides a dualistic status of the international law in the domestic law.⁹⁰ Basically this means that in case of a conflict between the domestic law and the international law, the domestic law would prevail over the international law. In order to become part of the domestic system, the Parliament had to promulgate the provisions of the international treaties and give them the force of the domestic law.

The provisions of the Constitution adopted in 1998 repaired most of the inadequacies of the old regulation. Article 122 of the Constitution recognizes a domestic status to the ratified international treaties and considers them as directly executable before domestic courts. According to this article, ratified treaties become part of the domestic law upon publication in the Official Journals. Consequently, the provisions of these treaties have the same effect as the domestic law and may be invoked by the individuals in the same way. This regulation should certainly be considered as a step in advance for the protection of human rights in general and the procedures of complaining against the interference of the state in particular.⁹¹ In this way, Albanian individuals would have other sources of remedies, additional to the ones provided in the domestic level for the violations of their rights guaranteed in the international treaties.

Nevertheless, even the new regulation of the status of the international law in the domestic law raises some questions. There are no provisions in the Constitution that could specify the fate of final decisions of the highest domestic instances in case of an adverse ruling in the international level. According to the Constitution, the decisions of the

⁸⁹ *Id.* at art. 24.

⁹⁰ Puto A., Public International Law, Vol. 1, 1993, Shtepia Botuese Albin, p. 28.

⁹¹ It is worth noting here that besides the main documents adopted by the Council of Europe in the field of human rights, Albania has ratified other important treaties of the United Nations, such as the two Covenants of Civil and Political Rights, and Economic, Social and Cultural Rights, the Convention against Racial Discrimination, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, etc.

Constitutional Court are final and irreversible.⁹² The same is valid for final decisions of ordinary courts.⁹³ As already said above, the Constitution stands on the top of the hierarchy of legal norms applicable over the Albanian territory, therefore it prevails over any other domestic law, including the international law.⁹⁴ The final and irreversible status of the decisions of the Constitutional Court as stated by the Constitution might be a problem for the implementation of the decisions taken in the international level, as provided in the ratified international treaties.

On the other hand, there are also opinions sustaining the idea that the final status of the decisions of the Constitutional Court relates only to the fact that there is no possibility to appeal the final decisions of the Constitutional Court in the local level. The acceptance of the jurisdiction of international bodies is not affected by the provision on the final status of the decisions of the Constitutional Court. This is due to the ratification of the respective international document and the straight recognition by the constitutional provisions of the obligation to comply with it. Consequently, there is no need of more explicit constitutional provisions on the status of the final decisions made in the international level.⁹⁵

As regard the set of rights included in the Constitution, in general this set is more substantial than the old one. The fact that they are provided in Part II, immediately after the preamble and the basic principles of the functioning of the Albanian state, shows the importance given to their protection. Here are also included the right of individuals to challenge a court decision to courts of the higher instances, and the right of rehabilitation and compensation in compliance with the law, in cases of damages caused by an unlawful act,

⁹² *Albanian Constitution* 1998, Art. 132.

⁹³ Civil and Criminal Procedure Codes, at respectively art. 510/a and art. 462.

⁹⁴ See chapter I, Part 1.3. As it will be shown in chapter V, the Constitution affords to the Convention a status that is different from that of other international treaties ratified by Albania.

⁹⁵ Loloçi K., Expert member of the drafting group of the Constitution, *Powers of the Constitutional Court*, interviewed by the author, Tirana, 17.06.2000.

action of the state bodies or their failure to act.⁹⁶ As it is clear, this definition does not specify the state authorities that could commit violations of the individuals' rights, as it was previously the case with the old provisions.⁹⁷ The drafters of the Constitution did not find opportune to refer to the judicial and administrative authorities as the only state bodies whose activity could affect the rights of the individuals. Naturally, the intention is to guarantee the responsibility of *any* state bodies in case of conflict with the individuals' rights.⁹⁸ On the other hand, the terms "*failure to act*" could be interpreted as accepting the horizontal application of the obligation of the state, implying that state authorities are obliged to take the necessary measures for protecting their individuals from any kind of violation, public or private. Based on this provision, the failure of the state to provide such guarantees will amount to a violation of the Constitution.

The chapter on the human rights of the citizens in the new Constitution ends with a section entitled "Social Objectives" of the Albanian state. This is another new feature of the new constitutional regulation. Basically, these provisions foresee engagements of the state with regard to certain economic and social conditions of the individuals, such as the employment especially for those who have limited abilities, education and qualification of the young generation in accordance with the abilities, protection of environment, etc. As it is obvious, here is included that category of "rights" that may not be guaranteed to everyone, for it depends on the concrete potential resources of the state. However, they remain as objectives for the state to fulfil them at the maximum extent possible. As a consequence, these objectives do not generate rights for the Albanian individuals in terms of obligations for

⁹⁶ *Albanian Constitution* 1998, Articles 33 and 44.

⁹⁷ Constitutional Amendment No. 7692, *supra* note 19, at art. 14.

⁹⁸ As will be shown in the subsequent chapters, administrative and judicial bodies still remain the only state bodies that have binding powers. However, this provision is a safe measure in the event of establishment of other state bodies whose work activity may have an influence on the private sphere of the individuals.

the state to comply with. Non-fulfillment of such goals by the state cannot be complained against in courts.

Another original characteristic of the new constitutional regulation is the provision of a specific form of participation of individuals in the law making process, where their rights are involved. According to the provisions of Part XI of the Constitution, Albanian citizens have the right to vote a law through a referendum or to ask the President to organize referendums for different issues of a special importance.⁹⁹ However, a referendum may be organized this way only if at least 50.000 voters have requested it. The possibility to vote a law through a referendum was provided also in the old constitutional provisions, but it was not stated as a *right* of the citizens. In this aspect, this makes the new regulation more progressive than the old one.¹⁰⁰ Thus, individuals are given the possibility to make decisions regarding issues that are of a special concern, such as the Constitution, or other laws that are directly related to their rights.

Finally, the most important development of the new constitutional provisions in the field of human rights protection is the regulation for the first time of the institution of the Ombudsman, as an officer in defense of the legitimate rights of the individuals by the unlawful actions of the state bodies. The official name of the Albanian Ombudsman is the People's Advocate. This institution's goal is to play an important role in the process of protection of individuals' rights by the state. In this way, Albanian individuals are given the possibility to use other recourses than the judicial ones to resolve their cases. This institution represents a possibility for those individuals that cannot afford a judicial process due to their limited financial sources, to be assisted for free in their conflicts with the state bodies.

⁹⁹ *Albanian Constitution* 1998, Art. 150/1.

¹⁰⁰ Article 3 of the Constitutional Law stated only that Albanian people exercise their power through their representative organs and the referendum. *Supra* note 16.

According to the Constitution, any person can file a complaint with the People's Advocate. After reviewing the facts and merits of the complaints, the People's Advocate may recommend the responsible authorities to take measures for remedying the harm occurred. People's Advocate can also institute proceedings before the Constitutional Court for issues that relate to human rights issues.¹⁰¹ Although the powers of the People's Advocate are limited to recommendations and reports, this institution serves to enhance the responsibility of state with regard to the protection of individuals' rights and freedoms that are put in stake by actions of state bodies.¹⁰²

3.4 The main features of the judicial system

After the change of the political system, Albanian judiciary was totally reorganized on the basis of the principles of impartiality and independence from the other two branches of the power. The Law No. 7561, dated 29 April 1992, "For the Organization of the Judiciary and Constitutional Court" that was part of the package of the constitutional laws, established a three instances judicial system whose competence was to deal with the conflicts raised in practice during the implementation of laws.¹⁰³ Thus, in case of an alleged violation, individuals had the possibility to complain in three instances of the judiciary. There was a division between the civil and criminal jurisdiction. However the system operated in the same way for both jurisdictions. Besides the ordinary courts, military courts were part of the judicial system with a jurisdiction over all cases where military officials were involved. The

¹⁰¹ *Albanian Constitution* 1998, Art. 134/6.

¹⁰² In more details, the powers of the People's Advocate will be analyzed in chapter VI dealing with the components of Remedial Effectiveness.

¹⁰³ Constitutional Amendment No. 7561, dated 29.04.1992, "For the Organization of the Judiciary and Constitutional Court," Official Journal 1992, Vol. 2, p. 81, at art. 5.

final decision in both ordinary and military jurisdiction was made by the High Court, whose decision was irreversible.¹⁰⁴ The prosecution office functioned as a part of the judicial system, but also as an independent and centralized body, under the authority of the General Prosecutor.¹⁰⁵ Its main duty was to conduct the investigations and represent the accusation in court.¹⁰⁶

As regard the administrative jurisdiction of courts, it did not find regulation in the constitutional provisions. Neither the provisions of the constitutional amendment No. 7561, nor the provisions of the Constitutional Law stated anything at all with regard to the administrative activity of courts. Only in 1995, upon the adoption of the *Civil Procedure Code*, administrative powers of courts found regulation in the provisions of this Code. The provisions of this Code that is still in force, do not foresee the establishment of administrative tribunals. Instead, they authorize civil courts to review administrative decisions allegedly in violation of the laws. Thus, within the structure of the civil courts there are sections of administrative jurisdiction dealing with conflicts raised between the individuals and administrative bodies. The administrative section consists in a special panel of judges that adjudicate administrative conflicts.¹⁰⁷

The same constitutional amendment No. 7561 provided the establishment of a new judicial institution, the Constitutional Court, as the highest authority to protect and guarantee respect for the Constitution.¹⁰⁸ According to Part II of this amendment, the Constitutional Court was the only authority that could take decisions on the incompatibility of laws and normative decisions of the central or local government with the constitutional provisions. In

¹⁰⁴ *Id.* at art. 6.

¹⁰⁵ *Id.* at arts. 14-15.

¹⁰⁶ *Id.* at art. 13.

¹⁰⁷ *Civil Procedure Code* 1996, Art. 320. Besides the administrative sections, within the structure of the civil courts, there exist also sections that deal with conflicts related to commerce, and family and minors. *Id.* For more on the administrative jurisdiction of the civil courts see chapters V and VI.

addition to this power, the Constitutional Court could also abrogate those laws or decisions that were found incompatible with the constitutional provisions.¹⁰⁹ The Constitutional Court could start action on a complaint or on its own initiative.¹¹⁰ Individuals, as well as other subjects defined in the Constitution, could ask the abrogation of any laws or normative decisions on the grounds of the incompatibility with their constitutional rights. However, not all normative decisions of the central and local government could be challenged by individuals in the Constitutional Court. Only those executive decisions that had a direct influence on the constitutional protected individuals' rights could be brought to the Constitutional Court for a constitutional assessment.¹¹¹

As regard the current regulation of the judicial system, the new Constitution did not bring any significant changes with regard to the jurisdiction of courts. It states only the basic principles of the organization of the judicial system, while the details of the functioning of different instances of the judicial system are provided in the Law No. 8436, dated 28.12.1998, "For the Organization of the Judicial Power in the Republic of Albania," adopted for the purpose of the implementation of the Constitution in the field of the judicial system.¹¹² The Constitution states that the judicial power is exercised by the High Court, as well as by the courts of appeal and the courts of the first instance (otherwise called the district court), which are established by law.¹¹³ Courts have the authority to try all criminal, military, civil and administrative conflicts, as well as, all other cases defined by law, except cases that relate

¹⁰⁸ Constitutional Amendment No. 7561, dated 29.04.1992, *supra* note 103, at art. 17.

¹⁰⁹ *Id.* at art. 24.

¹¹⁰ *Id.* at art. 25.

¹¹¹ *Id.* at art 24, at paras. 2 and 3.

¹¹² Law No. 8436, dated 28.12.1998, "For the Organization of the Judicial Power in the Republic of Albania," Official Journal 1998, Vol. 33, p. 1265.

¹¹³ *Albanian Constitution* 1998, Art. 135/1.

to constitutional conflicts, which are under the competence of the Constitutional Court.¹¹⁴ The district courts adjudicate in the first instance the conflicts presented by private or legal persons, in accordance with the civil and criminal procedure rules. The courts of appeal adjudicate in the second instance appeals of the decisions of the first instance courts. They adjudicate in three-judge panels.¹¹⁵ Military courts are also part of the judicial system. They consist in military courts of first instance and appeal. The Military Court of Appeal adjudicates in the second instance, appeals of the decisions of the military courts of first instance. It adjudicates in three-judge panels. The High Court is the highest judicial authority for both, ordinary and military jurisdictions.¹¹⁶ The procedures of adjudication of cases in the courts of all levels are provided in the *Code of Civil Procedure* and the *Code of Criminal Procedure*.

As regard the prosecution office, according to the new Constitution, it exercises the criminal prosecution and represents the accusation in court on behalf of the state.¹¹⁷ It is attached to the judicial system but is an independent body. The prosecution office operates as a centralized organ under the authority of the General Prosecutor. However, during the hearings of the case in courts, the prosecutors exercise their functions in complete independence. In the exercise of their powers, prosecutors are subject to the Constitution and the laws.¹¹⁸

The Constitutional Court still remains on the top of the judicial structure, but does not represent a judicial instance for receiving complaints regarding the decisions of the other courts, except in one case. According to article 131/f of the Constitution, the Constitutional

¹¹⁴ Law No. 8436, *supra* note 111, at art. 2.

¹¹⁵ *Id.* at arts. 5-7.

¹¹⁶ *Id.* at art. 13.

¹¹⁷ *Albanian Constitution* 1998, Art. 148.

¹¹⁸ *Id.*

Court has the status of the highest appealing instance for individuals' claims of violation of the right to due process, after the exhaustion of all available national recourses. The Constitutional Court has still the powers to control the compatibility of the laws enacted by the Parliament and normative decisions of the central and local government with the Constitution and also with the ratified international treaties, in difference to the previous constitutional regulation.¹¹⁹

The new constitutional provisions afford to the Constitutional Court a slightly more restricted jurisdiction compared to the former Constitutional Court, since they do not provide the power to consider cases on its own motion, as it was previously the case with the old constitutional laws.¹²⁰ Consequently, all its powers may be exerted only upon the request of any of the following subjects: 1) the President of the Republic; 2) the Prime Minister; 3) not less than one-fifth of the deputies; 4) the head of High State Control; 5). any court, under article 145, paragraph 2 of the Constitution;¹²¹ 6) the People's Advocate; 7) the organs of

¹¹⁹ According to article 131 of the Constitution, the Constitutional Court decides on:

- a. the compatibility of a law with the Constitution or with international agreements as provided in article 122;
- b. the compatibility of international agreements with the Constitution, prior to their ratification;
- c. the compatibility of normative acts of the central and local organs with the Constitution and international agreements;
- ç. conflicts of competencies among the powers as well as between central government and local government;
- d. the constitutionality of parties and other political organizations, as well as their activity, according to article 9 of this Constitution;
- dh. removal from office of the President of the Republic and verification of his inability to exercise his functions;
- e. issues related to the eligibility and incompatibilities in exercising the functions of the President of the Republic and of the deputies, as well as the verification of their election;
- ë. the constitutionality of a referendum and the verification of its results;
- f. the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law, after all legal remedies for the protection of those rights have been exhausted.

As it may be noticed, the original wording of the article refers to *rights* related to the due legal process, since there are several articles in the Constitution, which provide different guarantees that relate to the principle of due process.

¹²⁰ Constitutional Amendment No. 7561, dated 29.04.1992, *supra* note 103.

¹²¹ According to article 145/2 of the Constitution, when a judge of an ordinary court determines that a law is in violation to the constitutional provisions, he shall not apply it; in this case the judge is obliged to suspend the

local government; 8) the organs of religious communities; 9) political parties and other organizations; 10) individuals. The subjects contemplated in points 6), 7), 8), 9) and 10) may apply to the Constitutional Court only for issues that relate to their interests.¹²²

Thus, individuals can also challenge laws enacted by the Parliament and normative decisions of the central and local government in the Constitutional Court on the grounds of the incompatibility with their rights guaranteed by the international treaties ratified by Albania. However, the power of the Constitutional Court to declare unconstitutional laws and other normative acts on the grounds does not include the power to adopt a new law or decision, or to amend the conflicting parts. This is an exclusive power of Albanian Parliament who, in turn, is obliged to adopt the necessary legislative acts upon the decision of the Constitutional Court.

Upon its establishment, the Albanian Constitutional Court has abrogated a considerable amount of laws on the grounds of being incompatible with the constitutional provisions. Most of its decisions are related to the abrogation of laws as contrary to the Constitution, but decisions of the Council of Ministers have also been often assessed as conflicting with the Constitution and therefore abrogated. The most important case in this regard is the latest decision of the Constitutional Court No. 65, dated 10.12.1999, which abrogated the death penalty from the provisions of the *Albanian Criminal Code*, as being incompatible with the provisions of the new Constitution.¹²³

case and sent it to the Constitutional Court.

¹²² *Albanian Constitution* 1998, Art. 134. According to the Albanian People's Advocate, Mr. Ermir Dobjani, his office has requested the Constitutional Court the interpretation of the terms "*their interests*." Ermir Dobjani *Individuals' complaints to the Office of People's Advocate*, interviewed by the author, Tirana, 07.06.2000.

3.5 Administrative System

It must be noted at the very beginning that administrative activity in Albania found a proper regulation of its own only upon the adoption of the *Code of Administrative Procedures* in July 1999.¹²⁴ The principal function of the public administration consists in issuing statutory legal acts, for the purpose of the implementation of laws and other acts adopted by the legislative body. Administrative acts elaborate upon the provisions of a law the same way that law elaborates upon the principles within a Constitution. Consequently, the fair application of the laws depends, at a great extent, on the administrative activity of the central and local authorities.

Though lowest in the hierarchy of laws, administrative acts may nevertheless affect the rights of the individuals. They may be of a general or limited application.¹²⁵ According to the provisions of the *Code of Administrative Procedures*, the "administrative activity," consists in the totality of acts and actions through which is formed and manifested the will of the public administration, as well as the execution of this will.¹²⁶ The terms "administrative bodies" include:

- central power bodies that carry out administrative functions;
- public entities' bodies, to the extent that they carry out administrative functions;
- local power bodies that carry out administrative functions;

¹²³ Official Journal No. 33, 1999, p. 1301.

¹²⁴ Effective only since January 2000. In May 12, 1999, Albanian Parliament adopted the Law No. 8485, "The *Code of Administrative Procedures* of the Republic of Albania." However, the last article of the law provides that it will enter into force 6 months after the publication in the Official Journal. The Law was published in the Official Journal No. 19, dated 20 July 1999. Consequently it entered in force in 20 January 2000.

¹²⁵ This is related to the extent of their effect. According to articles 100 and 102 of the *Albanian Constitution*, the Council of Ministers and the Ministers may issue orders and decisions that have the same binding force as laws. These decisions may be of a general or local application. Based on the principle of decentralization of the local power, the authorities of the local government are also given powers to issue normative acts, regulations, or ordinances whose effect is limited within the respective locality. In addition to these powers, they enjoy as well the powers to enforce local acts and regulations. *Albanian Constitution* 1998, Art. 113.

¹²⁶ *Albanian Administrative Procedures Code* 1999, at art. 2.

-bodies of the Armed Forces, as well as any other structure whose employees enjoy military status, to the extent that they carry out administrative functions.¹²⁷

It must be noted, that the powers of Albanian administrative authorities are more precarious than the powers of any other official authorities, partly because of the discretionary nature that characterizes the executive activity, and partly because of the lack for several years of a proper administrative code, containing the rules on the administrative procedures of the decision making process. If the administrative process is compared with the legislative process that is guided by the rules of the internal regulatory statute of Parliament, and the judicial process that is conducted by the rules of the procedural codes, it becomes clear that there was a lack of transparency in the administrative activity before the entry into force of the new Code. Taking into account the fact that in most modern constitutional democracies, administrative acts define literally hundreds of details that affect the daily lives of the citizens the chances of abusing the rights of the citizens are bigger than in the legislative or judiciary process.¹²⁸ These are the main reasons why the administrative activity in Albania is subjected to a triple control:

- a) administrative control;
- b) judicial control;
- c) political control.

The administrative control is realized through the supervision of administrative bodies on a hierarchical basis. This basically means that administrative bodies of higher instances may review the acts of lower administrative bodies. All administrative bodies have the powers to revoke, repeal or modify their own administrative acts or the acts of lower

¹²⁷ *Id.* at art. 3.

¹²⁸ Usually Parliament when enacting a law does not specify all the details necessary to implement it. These details are left to the executive branch to define them through administrative acts. What is dangerous about it relates to the fact that such regulations may run out of the limits of the law upon which it is based.

instances in the administrative hierarchy.¹²⁹ As regards the political control, it is realized through the responsibility of executive authorities such as, the Council of Ministers or individual ministers, before the Parliament. Amongst these three types of controls on the administration, the judicial control is surely the most important and efficient one due to the advantages that the judicial system entails in comparison with the two others.¹³⁰

3.6 Practical observations

A constitution merely sets the parameters of the judicial and administrative system. The most important job of making sure that they function the way they should rests with individual judges, lawyers, state employees and citizens. Although the political, legal and social situation has changed a lot in comparison with the old communist regime, the mentality of people seems to be the most difficult to change. Since the concept of human rights during the communist regime in Albania was almost an unknown and foreign concept, the majority of people lost the concept of personal freedom. The consequences of such a mentality are still alive in the present day Albanian society, affecting to a considerable degree the consolidation of the effective protection of the human rights. The perception that common people have of the concept of human rights is somewhat vague and generally there is a lack of awareness about the existence of a sphere of personal freedoms that the state is not permitted to interfere with. Very little is being done for raising the public awareness regarding the guarantees of human rights that are provided in the Constitution, international treaties and other laws of the country.

¹²⁹ *Albanian Administrative Procedures Code*, 1999, Art. 135.

¹³⁰ Administrative activity will be dealt again in chapter VI.

The roots of the old communist ideology are also still present in the practice of work of some of the main state's institutions such as police, courts, etc. Although there are no official confirmations, there are serious allegations about the use of violence and inhuman treatment of the accused persons during the investigation proceedings.¹³¹ Other complaints have reported violations of the rights of the arrested individuals to be brought within a short period of time before a judge, and to have their case determined and decided within reasonable time limits.¹³²

It seems that, in practice the Albanian government is still very weak to implement all the guarantees that are provided by the constitutional laws in the field of protection of the individuals' human rights. It could be also that the currently in force constitutional guarantees are too advanced for the realistic capacities of the Albanian state, which is still in the phase of consolidation of the democratic system established only ten years ago. As a consequence, in practice, very few provisions of the constitutional guarantees are being implemented in the proper way.¹³³

3.7 Conclusion

The provisions of the new Constitution are much more progressive than the old provisions of the constitutional laws in terms of human rights protection, international laws

¹³¹ Albanian Helsinki Committee, *supra* note 35, Reports of January-March 1998; April -June 1998; July - September 1998.

¹³² US Department of State, Bureau of Democracy, Human Rights and Labour, *Albania Country, Report on Human Rights Practices for 1998*, February 26, 1999. The same claims are made very often in public by members of the opposition that accuse the government to use these methods for political reasons.

¹³³ Mema B., Director of the Tirana District Police. *Human rights Protection by the Police*, interviewed by the author, Shkoder, 15 December 1999.

and remedies. The new Constitution affords protection to greater amounts of rights and freedoms and provides another status for the international human rights law. Consequently it offers more guarantees for the individuals with regard to the protection of their human rights. The general principles stated in the Constitution with regard to human rights are substantiated in details in the Codes of Criminal, Civil and Administrative Procedures. In case of civil, criminal or administrative conflicts, Albanian individuals may access three instances of the judicial system, as well as, the Constitutional Court for certain claims related to the rights to due process. Theoretically, constitutional provisions entitle individuals to receive remedies from ordinary courts for any violations committed by the official authorities. There is also a possibility for the individuals to challenge national laws and normative decisions of the central and local government to the Constitutional Court, on the grounds of incompatibility with the Convention. Although not necessary under the requirements of article 13, such provision is a positive feature of the Albanian legal regulation in terms of human rights protection.

However, although very progressive, the new constitutional provisions do not take a clear position with regard to the status of the rulings of international bodies *versus* the final rulings of the highest authorities in the national level. This could turn out to be a problem for the international engagement of Albania. Naturally, the most affected by the consequences of this situation will be the individuals, since the outcome of their applications in the international level will depend on the implementation of the final decision.

CHAPTER IV

INSTITUTIONAL EFFECTIVENESS

4.1 Introduction

As already mentioned in chapter II, institutional effectiveness requires that the national authority formally entitled to grant remedies for individuals that claim a violation of their rights under the Convention, be independent from the authority that has allegedly committed the violation. If these authorities are not independent they will not be able to grant effective remedies for the harmed individuals, simply because they will be under the influence of the authority claimed responsible for the violation committed. Such condition is usually related to cases where both authorities, (the one that has allegedly committed the violation and the appealing authority), are part of the same branch of power, namely the executive, legislative or judicial power. However, the fact that the body entitled to deal with the complaint against the decision allegedly in violation of the Convention is under the authority of the official that took this decision does not automatically render ineffective the remedies provided.¹³⁴ Rather, it should be proved that the body that deals with the appeal couldn't make an independent decision because it is under the influence of the authority responsible for the first decision. Also, the recourse to the same authority that issued the decision does not qualify as an effective recourse for the purposes of article 13.¹³⁵

This chapter examines the ways Albanian authorities that are responsible for granting remedies in cases of violations of individuals' rights under the Convention cope with the requirements of institutional effectiveness. Since the notion of independence is a very broad

¹³⁴Harris *et al.*, *supra* note 62, at p. 450.

¹³⁵*Silver and Others v. United Kingdom*, *supra* note 41.

term, it would actually require an analysis of all the possible channels of complaints available in the domestic system. As a consequence, the principal standards regarding the notion of independence are "borrowed" from the work of different legal scholars, as well as by the interpretation of the European Court in the relevant cases. Thus, this chapter focuses on the institutional independence of the principal authorities in Albania, which are formally entitled to deal with the complaints of individuals regarding violations of their rights, namely courts and administrative authorities. The implications that are reflected in practice are also illustrated here. At the end, it shows that, at least theoretically, the Albanian responsible authorities satisfy to a considerable extent the requirements of institutional effectiveness.

4.2 Courts' independence

4.2.1 Theoretical independence

It is worth to begin the analysis on the independence of Albanian authorities that are officially responsible for dealing with the claims of the individuals with the judicial authorities, as the primary instances where the Albanian individuals address their complaints on cases of violations of their rights. According to a legal scholar, the independence of judiciary depends, first of all, on the relationship of the judiciary with the other two branches of power, but especially the executive one.¹³⁶ An independent judicial branch would be able to grant legal recourse and protection of the individuals' rights even against the government. Referring to the main principles of organization of the power, the whole structure and

¹³⁶ Favilla G., *The Separation of Powers and the Independence of the Judiciary from the Government. Recruitment procedures*, Concept Paper, Council of Europe, Representative Office in Albania, 1998, p. 2.

functioning of the Albanian state is based on the principle of separation of powers. According to this principle, the three fundamental functions of the state are carried out by three different authorities or powers, so that none of them can prevail over the other. Thus, courts, as authorities of the judiciary system are principally excluded from any sort of interference in their work. However, the Albanian system is not an approach of a complete and total independence of the judiciary from the other two powers. As in most democratic systems of governance, each branch of power has been given a sort of ability to control the other two branches when they exceed the appropriate limits of their power.¹³⁷ Nevertheless, these powers do not affect the independence of judiciary in terms of influences in the performance of its functions.

As regards the organizational structure of the judiciary, its instances are organized in such a way that prevents interferences of one instance on another. As already discussed in the previous chapter, the judicial system in Albania is composed of three court instances, which function on the basis of a hierarchical structure. Courts of Appeals that review the decisions of Districts' Courts are higher in the judicial hierarchy and consequently cannot be institutionally influenced in any way by Districts' Courts. The same argument is valid for the High Court that is the highest instance of the ordinary court system.

According to the formal guarantees provided in the Constitution of 1998, judicial officials cannot engage in any other public or private activity, what means that this profession is incompatible with the exercise of any other function.¹³⁸ Furthermore article 145 of the Constitution states that judges are independent and rely only on the Constitution and other

¹³⁷ The principle of separation of powers presumes that the legislative branch sets the rules, the executive carries out governmental activities and the judiciary applies the rules in the concrete cases, by solving the controversies and imposing sanctions when the law is violated or crimes are committed. In reality, the principle of separation of powers is not strictly respected: governments issue regulations; judges have administrative functions and so on. The intention is that in case one branch of the power abuses its powers, the other branches will have the necessary powers to correct the situation. *Id.*

¹³⁸ *Albanian Constitution* 1998, Art. 142.

laws of the country. This article stresses explicitly that the only “authorities” that can influence the decisions of judges are the Constitution and legal provisions in force, thus excluding any institutional pressure. Paragraph 3 of the same article states that there will be consequences of legal responsibility for any interference in the activity of courts.¹³⁹ Other safeguards of the independence of the judiciary are provided in article 135 of the Constitution, which prohibits the establishment of exceptional courts, although it provides the possibility for the Parliament to establish special courts for the adjudication of specific cases.¹⁴⁰

Considering other factors that might have an indirect, but still a strong influence on the independence of judiciary, the financial resources of courts could be regarded as potential ones.¹⁴¹ It is important that the judiciary has some degree of control over its own budgets. If the budgets of the courts are controlled, for example by the executive power, it could dictate the courts how to spend the money and might even cut out the funding, unless the courts rule in accordance to the political dictates of the government. Thus, the administration of the budget by the judiciary itself is an important safeguard against such implications. The rules provided by the new Constitution in this regard could be considered as satisfactory enough. Courts have their own budget, which they can administer in accordance to their necessities. According to article 144, the Parliament approves the courts' budgets, allocating them the necessary funds. The designation of expenses of each court is assigned to a special office,

¹³⁹ The concrete sanctions against the judges that do not respect the rule stated by this article are provided in the law No. 8436, dated 28.12.1998, "For the Organization of the Judicial Power in the Republic of Albania." *Supra* note 112.

¹⁴⁰ Actually, it is not clear what would be the status of these courts. They might deal with specific issues relating to the state, or other specific subjects. For example, an exceptional court might deal only with cases related to the national security issues or other. Article 145/3 of the Constitution provides only the possibility of establishment but it does not say more on the structure and the functioning of these courts, the appointment of the judges, their powers, etc. In practice, the establishment of these courts may create confusions and conflicts with the jurisdiction of the ordinary courts. Maybe it would be better to provide a prohibition of the establishment of any sort of special courts without exceptions.

¹⁴¹ Pulver R., *Will the New Albanian Constitution Safeguard Judicial Independence*, Concept Paper, OSCE Presence in Albania, Legal Counselor's Office, 1998, p. 1.

namely the Office for the Administration of the Judicial Budget established by Law No. 8363, dated 01.07.1998.¹⁴² The law assigns broad powers to this Office regarding the administration of courts' finances. The Office can manage the funds approved by the Parliament, without consulting the Ministry of Justice on the ways to spend this money. The highest body of the Office is the supervising board that is composed of judges of the Districts' Courts, Courts of Appeal and the High Court, as well as, one representative from the Ministry of Justice. The board is chaired by the Chief Judge of the High Court. This means that the chairman of the supervising board is changed every time a new Chief Judge of High Court is appointed. The running of the Office by the judiciary itself is a positive measure against any informal institutional influence on the judiciary.

The stability of judges' positions could also be influential on the independence of judiciary.¹⁴³ The authorities that have the powers to appoint or remove judges from their positions should be able to afford a sufficient amount of independence. Giving these powers to the judiciary rather than to the executive or legislative branch it is a safe measure against any influence by the other branches of power. The new *Albanian Constitution* copes very much in this way with this issue. According to article 136/4 of the Constitution, the appointment of judges of the courts of Districts and Appeals is under the jurisdiction of the President of the Republic, but based on the proposals of the High Council of Justice.¹⁴⁴ This body is a mixture of executive, legislative and judicial representatives.

However, the judicial power represents the majority in this mixture. It is represented by the Chairman of the High Court and 9 judges from the three court instances, elected by the National Judicial Conference. The executive and legislative branches are represented,

¹⁴² Law No. 8363, dated 01.07.1998, "For the Establishment of the Office for the Administration of the Judicial Budget," Official Journal 1998, Vol. 16, p. 537. The law intended to reduce the amount of the political pressure that the Ministry of Justice and executive power in general may put on the judiciary.

¹⁴³ Favilla G., *supra* note 136, at p.2.

¹⁴⁴ *Albanian Constitution* 1998, Art. 136/4.

respectively, by the President of the Republic and the Minister of Justice, and 3 deputies elected by the Parliament. It may be argued that this combination is adequate enough to assure the independence of the High Council of Justice in the making of the decisions. In this way, the composition of this body is balanced and cannot be easily dominated by a single branch of the power, or by a single strong authority.

It is also important that sufficient safeguards be provided in order to make sure that the judge-transfer policy is not used to exert political pressure on judges.¹⁴⁵ The body responsible for the transfer of judges must itself be protected from political pressure. The *Albanian Constitution* has afforded this power to the same body that has the power to appoint judges, namely the High Council of Justice. Thus, this body has the powers to transfer judges and take measures regarding their responsibility, as provided by law. The dismissal of judges of the first and second court instances is also under the competence of the High Council of Justice, but only for the cases provided by article 147/6.¹⁴⁶ According to the last sentence of this article, the judges who are dismissed have the right to appeal to the High Court.¹⁴⁷ However, the same article states that judges cannot be transferred against their will, except when such is necessary for the purposes of the "*reorganization of the judicial system*."¹⁴⁸

From this general overview of the guarantees provided for the purpose of guarding against the influences in the work of the judicial authorities, it seems that these authorities are able to fulfill the requirements of institutional effectiveness, at least as far as the formal

¹⁴⁵ Pulver R., *supra* note 141, at p. 3.

¹⁴⁶ Article 147/6 of the Constitution states that judges can be dismissed from their positions only if they become mentally or physically disable, commit crimes or acts that undermine seriously the position of a judge, or for professional incompetence.

¹⁴⁷ The article mentions only the case of the dismissed judges, what presumes that the transferred judges may not recourse to the High Court for the act of transfer.

¹⁴⁸ However, in practice there have been cases, where decisions of the High Council of Justice on the transfer of the judges have been attacked as being in abuse of the power afforded by article 147/6, such as the Decision No. 1, dated 30.02.1995, the Decision No. 7, dated 06.02.1996 and the Decision No. 8, dated 23.08.1996. These decisions have been abrogated by the Constitutional Court as being in violation of the constitutional provisions in the Decision No. 13 of the Constitutional Court, dated 29.05.1997, Official Journal 1997, Vol. 7.

guarantees are concerned. As a consequence, it can be assumed that the decisions delivered by courts in Albania are fair in terms of the independence of the decision making process.

4.2.2 Practical independence

The above description is only the theoretical side of the problem. The amount of independence that the work of the judicial authorities reflects in practice is more important than the formal stipulations. These last four years it has been experienced a continued political instability, limited financial resources, political pressure and endemic corruption.¹⁴⁹ All these factors have weakened the judiciary's ability to function independently and efficiently. Very often, judges are attacked by the public opinion as being subjected both to bribery attempts but also to intimidation.¹⁵⁰ Also, the destruction of many court and police records during the civil disorders of March 1997 seriously impaired the ability of prosecutors and police to investigate and prepare cases properly. Courts operate with very limited material resources, inadequate legal libraries, and judges often do not possess copies of the recently passed legislation. Moreover, during the last four years, the reputation of judicial officials has been seriously undermined, due to the appointment in the positions of judges and prosecutors individuals with only a 6-month legal education.¹⁵¹

¹⁴⁹ Albanian Helsinki Committee, *supra* note 35, Reports of April- June 1998, October-December 1998, pp. 8-9.

¹⁵⁰ Carlson S., *supra* note 77, at pp. 27-28.

¹⁵¹ Decision No. 133 of the Council of Ministers "For the Opening of Training Courses for the Staff of the Prosecution Office, Judicial Police and Courts" (unpublished). More than 400 persons attended these courses. Some of them were from those families that had been persecuted by the communist regime, but most of them were identified as loyal followers of DP. At the end of the term of six-month, they were permitted to take examinations at the Faculty of Law, leading to the issuance of lawyers' diplomas, and appointment in various positions in the judiciary system, including the positions of judges and prosecutors. Albanian Helsinki Committee, *supra* note 35, Report of January-March 1998, at p. 10.

In 1997, Albanian Parliament adopted the Law No. 8265, dated 18.12.1997, "On the Organization of the Judicial System in the Republic of Albania," which intended to repair the criteria of appointment of the lawyers in the positions of judges and prosecutors.¹⁵² According to article 19 of this law, judges and prosecutors must have a law degree, obtained upon the completion of legal studies, in accordance with the legislation in the area of university studies in the Republic of Albania. Article 48 of the same law authorized the High Council of Justice to investigate individually all cases of judges that would be dismissed from their positions upon the entry into force of the law. As it is clear, the law intended to replace that category of judges and prosecutors that did not have the proper legal education at the time of appointment in their positions. However, very few persons left the court bench after the entry into force of the requirements of the above law. A considerable number of judges from the category of the "six-month education" lawyers still hold their positions.¹⁵³

Another measure was taken in 1997, aiming at the amelioration of the above situation. A Magistrates' School was established for the preparation of the new generation of judges.¹⁵⁴ In the near future, lawyers that will be appointed as judges must necessarily hold a degree from the Magistrates' School, additionally to that of the Law School.

¹⁵² Law No. 8265, dated 18.12.1997, "On the Organization of the Judicial System in the Republic of Albania," Official Journal 1997, Vol. 19, p. 463. This law was repealed by the law No. 8436, dated 28.12.1998, "For the Organization of the Judicial Power in the Republic of Albania," *supra* note 112.

¹⁵³ A group of lawyers from the above category went on hunger strike, as a consequence of which the application of the provisions of the law was conditioned upon the termination of the examination of each case individually. Albanian Helsinki Committee, *supra* note 35, Report of January-March 1998, at pp. 10-11.

¹⁵⁴ Law No. 8136 "For the Magistrates' School in the Republic of Albania", dated 31.07.1996, Official Journal 1996, Vol. 21, p. 755.

4.3 Administrative authorities

Taking into account the fact that the administrative activity implicates intensively the practical application of the individuals' rights, the amount of independence that administrative authorities in Albania can afford is crucial for remedying properly those individuals that have been caused an administrative harm. According to the provisions of the new Administrative Code adopted only recently,¹⁵⁵ individuals may challenge those administrative decisions that are allegedly in violation of the laws in force, to the higher administrative instances.¹⁵⁶ Administrative authorities that are entitled to review the complained decisions are, respectively, the body that has issued the administrative act appealed or has refused to issue an administrative act, and the superior body of the one that issued the first decision.¹⁵⁷ When the appeal is directed to the superior body, the latter transfers the respective file to the body that issued/refused to issue the act appealed, together with its ideas about the solution of the case.¹⁵⁸ The latter must either accept the request of appeal or, in the contrary case, transfer it to the superior organ, which must decide within two weeks.

If the above provisions are compared to the interpretation of the European Court regarding the notion of independence, it may be argued that the challenging of an administrative decision to the same body that made the decision in the first place poses

¹⁵⁵ See note 124.

¹⁵⁶ Article 137 of the *Administrative Procedures Code*, 1999, provides:

1. Every interested party has the right to appeal against an administrative act or against the refusal to issue an administrative act.
2. The administrative organ to which the appeal is directed examines the legality and regularity of the contested act.
3. In principle, the interested parties may turn to the court only after they have exhausted the administrative recourse.

¹⁵⁷ *Albanian Administrative Procedures Code*, 1999, Article 139.

¹⁵⁸ *Id.*

questions with regard to its effectiveness. There seem to be very few chances that the authority responsible for the issuance of an illegal administrative act corrects its own decision after the complaint of the private parties. From this point of view, the appeal to the same administrative authority that made the first decision does not satisfy the criteria of institutional effectiveness.¹⁵⁹ Consequently, only the recourse to the superior administrative authority could be qualified as a remedy, which complies with the criteria of institutional effectiveness as interpreted by the European Court. Although, according to the provisions of the Administrative Code the superior body may send the case back to the body that made the first decision together with its opinion, the final decision rests with the latter.¹⁶⁰

The new Constitution provides also the possibility to challenge the decisions of the central and local administration on the grounds of the compatibility with the Constitution. It entitles the Constitutional Court to review the normative decisions that allegedly conflict with the provisions of the Constitution. The Constitutional Court may abrogate those decisions, which at the end of the constitutional assessment process have resulted to be in violation of any of the provisions of the Constitution.¹⁶¹ As regards the independence of the Constitutional Court, as already showed in chapter III, this court is the highest authority for the interpretation the Constitution and international treaties and as such, it is subordinated only to the Constitution. Consequently, it is excluded from any kind of institutional interference.¹⁶²

¹⁵⁹ *Silver and Others v. United Kingdom* (1983), *supra* note 41. According to the conclusion of the European Court in this case, the complaint to the Home Secretary regarding the validity of his directions could not satisfy the criteria of institutional independence, since in this case he would be a judge of its own case.

¹⁶⁰ Article 142 of the *Code of Administrative Procedures* provides:

1. If the organ that has issued or not issued the administrative act appealed against decides to accept the requests of the appeal, it takes the respective decision.
2. If the organ mentioned in paragraph 1 of this article does not accept the requests of the appeal, it must transfer the appeal to the superior organ, which decides in connection with the appeal within two weeks.

¹⁶¹ *Albanian Constitution* 1998, Art. 132/1. See also chapter III, part 3.4.

¹⁶² *Id.* at art. 124/2.

4.4 Conclusion

The principal authorities that deal with the complaints of the individuals concerning violations of their substantial rights are theoretically excluded by influences of other state authorities in the exertion of their powers. Thus, court instances exert their powers independently from each other, as well as from other official institutions that deal with individuals' complaints. Consequently, it could be accepted that, theoretically, Albanian courts are able to afford a sufficient amount of independence.

As regards the administrative bodies, they are safe from any influences by other state authorities during the administrative examination of the individuals' complaints. The administrative recourse to the same authority that issued the illegal or irregular decision could be consider as being potentially ineffective, as the administrative body will be *a judge of its own case*. However, the recourse to the superior administrative body, which has the ultimate authority on the complaint, satisfies the criteria of institutional effectiveness. As a conclusion, it may be stated that generally the requirements of institutional effectiveness are adequately met by the rules of the institutional organization in Albania.

CHAPTER V

SUBSTANTIVE EFFECTIVENESS

5.1 Introduction

The notion of substantive effectiveness implies the possibility of individuals to raise claims that relate to the rights contained in the Convention before their national authorities.¹⁶³ According to the definition of substantive effectiveness, the status of the Convention in the domestic laws does not affect the amount of effectiveness of the local remedies provided at the local level. The choice of the states not to incorporate the Convention in the domestic laws does not amount to a violation of the requirements of article 13.¹⁶⁴ Rather, it is sufficient that individuals be able to invoke the substance of the Convention's provisions through the domestic laws.¹⁶⁵ On the other hand, incorporation of the Convention into the domestic laws does not exclude the possibility of a violation of the requirements of substantive effectiveness. It has been argued that, such conditions, as the exact place of the Convention in the hierarchy of domestic laws, matters of standing and justiciability may serve to deny an effective remedy in a particular case.¹⁶⁶ It is also not a condition of this component that the guarantees for the protection of human rights be necessarily embodied in the constitutional provisions. If the domestic laws enable individuals to raise the same arguments, as they

¹⁶³ Harris *et al.*, *supra* note 62, at p. 451.

¹⁶⁴ *Silver and Others* case (1983), *supra* note 41, at para. 113.

¹⁶⁵ *Soering v. UK*, (1989), *supra* note 43, at para. 121.

¹⁶⁶ Harris *et al.*, *supra* note 62, at p. 451.

would have risen before the European Court, this will be sufficient for the requirements of substantive effectiveness.¹⁶⁷

This chapter evaluates the space that is given to the substance of the provisions of the Convention in the *Albanian Constitution* and ordinary laws. It also analyses the position of the Convention in the hierarchy of legal norms applicable at the national level, as well as the powers of the Constitutional Court and ordinary courts with regard to the applicability of these provisions. It shows that individuals in Albania have the possibility to invoke the substance of the Convention before the Constitutional Court and ordinary courts because of the special status of the Convention in the domestic laws of Albania.

5.2 The scope of the substance of the Convention in the constitutional provisions

The new *Albanian Constitution* contains safeguards that are similar to the Convention in terms of guarantees for the protection of human rights. The language of the constitutional provisions is very similar to the wording of the articles of the Convention. However, it should also be admitted that the Constitution shows a notable effort to bring a sort of authenticity in the regulation of issues that are of a great concern in the current situation of human rights protection in Albania. In general, the constitutional provisions provide a greater amount of rights and freedoms than the Convention itself. Part II of the Constitution, entitled "The Fundamental Human Rights and Freedoms," includes in chapter I the full set of civil rights that are provided in the Convention. Amongst these rights the most significant are

¹⁶⁷ *Id.*

the right to life; the freedom of speech; the right to information; the freedom of religion; the right not to be submitted to torture; or other inhuman treatment; the freedom of movement; the right against slavery and forced labor; the right against illegal arrest; the right to a fair public trial; the non-retroactivity of the criminal law; the presumption of innocence; the privacy of the correspondence; the inviolability of the residence; the right to property; the right to appeal a court decision to higher judicial instances; the right of everyone to get compensation and rehabilitation, if it has been proved that a violation has occurred because of the illegal acts or failure to act of state authorities.¹⁶⁸

The subsequent chapters III and IV contain guarantees for the other categories of human rights, respectively political, economic, social and cultural rights.¹⁶⁹ Here are included the right to vote and to be elected, the right to assembly for lawful purposes, the right to organization under the conditions of the law, the right to health insurance, the right to strike, the right to receive social assistance, the right to marry and built up a family, the right to education, the author's rights, etc..¹⁷⁰ There are also guarantees provided for the members of national minorities living in Albania, such as the right to exercise equally their equal rights and freedoms, the right to express freely their ethnic cultural and linguistic identity, the right to educate and get educated in their language, as well as to gather in organizations promoting their interests and identity.¹⁷¹

In short, the guarantees contained in the Constitution seem to match very much with the substance of the articles of the Convention. However, there is one article that poses doubts with regard to the essence of the above guarantees. Paragraph 3 of article 18 provides the possibility of discrimination in the application of the above human rights guarantees if

¹⁶⁸ *Albanian Constitution* 1998, Arts. 21-44.

¹⁶⁹ This scheme is a new feature of the constitutional provisions, since the old constitutional provisions did not make a division of the rights into categories.

¹⁷⁰ *Albanian Constitution* 1998, Arts. 45-58.

there is a "lawful and objective reason." This provision caused strong discussions during the drafting process, where different subjects argued that such a condition could be used as a justification for abuses in the application of the individuals' rights in practice. As, the drafters of the Constitution explained, this provision intends only to justify positive discriminations in treatment, such as the military service that is obligatory only for men.¹⁷² However, if analyzed from another perspective, the application of this provision in practice, may deprive the individuals that are affected by the discriminatory measures from invoking in the domestic courts the guarantees of the Convention against the discrimination, since as showed above, the *Albanian Constitution* is higher than international treaties.¹⁷³

On the other hand, it could be argued that the Convention has in the domestic legal order a status that is different from the status of other international treaties ratified by Albania. Concretely, if referred to article 17 of the Constitution, it states explicitly that the basic human rights and freedoms guaranteed by this Constitution may be restricted only in specific cases as provided by law, but always upon the condition that they do not undermine the essence of the basic human rights and freedoms and more importantly, do not override in any way the restrictions that are provided in the Convention.¹⁷⁴ This is a particular provision that motivates different interpretations. Firstly, it affords to the Convention a sort of constitutional status: when making a decision on the limits that a law imposes on the rights

¹⁷¹ *Id.* at art.20.

¹⁷² Minutes of the meeting *Discussion on the Draft Constitution*, held in 21 October 1998 with law students, lawyers and members of the Commission for the Drafting of the Constitution, at the Faculty of Law, University of Tirana, p. 7.

¹⁷³ See chapter I, Part 1.3.

¹⁷⁴ Article 17 of the Constitution provides:

1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.
2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

of the individuals, the Constitutional Court must refer also to the Convention and compare these limits with the standards of its provisions.

Another argument would be that, according to the wording of the article, the lowest protection that the rights guaranteed in the *Albanian Constitution* would be afforded, is the one provided by the provisions of the Convention. It is basically as if the Convention was incorporated in the provisions of the Constitution, since for every right guaranteed in the Constitution the limits provided in the Convention for the respective right would apply. Following this logic, it could be argued that the mentioning of the Convention in the constitutional provision has placed it at the level of the Constitution. In other words, in the hierarchy of legal norms applicable in the legal system of Albania, the Convention would be classified in the first place, together with the Constitution. This would make it be an exception in comparison with other international treaties, which come second in this hierarchy. Given this status, it could be argued that the substance of the provisions of the Convention is not affected by the provision of article 18 above.

If the recognition of a domestic status to the provisions of the Convention is analyzed from a more realistic point of view, is it difficult to say whether Albanian judges will be able to make judgments on the claims of violations of the most important treaties in the field of human rights. Partly because of the characteristics of the legal system that oblige judges to rely solely on the written laws,¹⁷⁵ but also affected by the scarce experience of 45 years of the communist regime whose political ideology superseded any legal principle, Albanian judges are used to simply apply the law without raising many constitutional objections. Taking into account also that the meaning of the provisions of the Convention has been largely elaborated and expanded by the practice of the European Court and the European Commission, this issue becomes more problematic. As it is often noted, Albanian judges and lawyers in general are

¹⁷⁵ As noted above, Albanian legal system is an approach of the civil law system. See chapter I, Part 1.3.

not very familiar with their practice.¹⁷⁶ The reasons behind this situation vary but the most significant ones derive from the poor quality of the legal education, which has decreased significantly these late years, the lack of experience in international law matters and also scarce sources of information on the international academic development. There is also a lack of judgments on the compatibility of Albanian laws with the standards of the ratified international treaties, what makes it more difficult to judge on the abilities of Albanian judiciary regarding the analysis of international standards. This is a matter that hopefully, will be given answer by the future practice.¹⁷⁷

However, the provision of article 17 shows the commitment toward the engagements undertaken by Albania with the ratification of the Convention. It is the first time that an international treaty is given this status by the constitutional provisions of Albania, what should certainly be considered positively. On the other hand, the recognition of a domestic status to the Convention and other international treaties would not be sufficient, if the substance of their provisions can not be enforced at the domestic courts. In this respect, article 122 of the Constitution considers the provisions of the ratified treaties as directly executable in courts, except the treaties that are not self-executable. In the latter case, it is necessary that they be promulgated by the Parliament.¹⁷⁸ Once ratified by the Parliament, they prevail over any domestic *law* that conflicts with them.¹⁷⁹

¹⁷⁶ Judge Sinani G., Tirana District Court, "The quality of the legal preparation of judges," interviewed by the author, Tirana District Court, 11 March 2000. Currently, there are no organized legal publications of the decisions of the European Court or other international bodies. Only these last two years, there are being published parts of decisions of the European Court in some law reviews, such as the Albanian Human Rights Law Review, published by the Albanian Center for Human Rights Documentation, but not on regular basis. Based on a personal survey conducted during the period of time March-May 2000 in the premises of courts, it resulted that only the High Court has a library that is adequately equipped with international and domestic legal materials.

¹⁷⁷ Only the recent decision No. 58 of the Constitutional Court, dated 10.12.1999, abrogating death penalty in Albania, contains a partial assessment of the right to life with the provisions of the Convention. However, in this case the Constitutional Court focuses more on the legal engagements that Albania has undertaken with the ratification of the Convention than on the standards of the right to life as provided by the Convention, or interpreted by the European Court.

¹⁷⁸ Article 122 of the Constitution provides:

There is another situation that does not find a proper regulation in the currently in force constitutional provisions. It relates to the right of individuals to challenge in courts the administrative decisions. The current constitutional regulation does not contain any provision that could explicitly empower courts to review the lawfulness of the administrative decisions. Concretely, Part IV of the Constitution that deals with the powers of courts does not say anything with regard of the administrative jurisdiction of Albanian courts.

Even, from a general overview of chapter II of the Constitution, dealing with the basic rights and freedoms of the individuals, it results that there are no provisions about the right of individuals to challenge in courts administrative decisions conflicting with their rights. If referring to article 13 of the Convention, it could be argued that effective complaints to the *national authorities* include all recourses to the local bodies that are responsible for dealing with the claims of individuals concerning violations of their lawful rights. Consequently, the recourse to courts for administrative violations of the protected rights must be theoretically available to the affected individuals.

Although the right of the individuals to seek recourse from courts for challenging administrative is provided in the *Civil Procedure Code*, it is generally accepted that the fundamental right of citizens to challenge administrative acts has a constitutional origin.¹⁸⁰ Thus, in the absence of an administrative procedure code, as it was the case until January

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.

2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.

3. The norms issued by an international organization have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organization is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.

¹⁷⁹ *Id.* at paragraph 2.

¹⁸⁰ Carlson S., *The Power to Challenge Administrative Acts*, Concept Paper, OSCE Presence in Albania, Legal Counselor's Office, 1998, at p. 1.

2000,¹⁸¹ citizens should nevertheless have the right to challenge administrative acts. It could also be argued that since the right of individuals to challenge courts' decisions to the higher judicial instances has been given a constitutional status, the same should be guaranteed for the right to challenge administrative decisions to courts. However, as discussed in chapter II, substantial effectiveness does not require that the substance of the Convention be necessarily materialized in the constitutional provisions.¹⁸² If the provisions of other laws enable the individuals to raise the same claim, this will be sufficient for complying with substantive effectiveness. As discussed above, the civil procedural provisions are very clear about the administrative jurisdiction of courts. Consequently, the lack of constitutional provisions on the right of the individuals to challenge administrative decisions in courts would not amount to a violation of the requirements of substantive effectiveness.

5.3 Other human rights related laws

As it is clear from the above overview, the new Constitution affords protection to a considerable set of rights, which in substance are equivalent to the rights provided in the Convention. However, as discussed above, individuals may be enabled to raise a Conventional claim even by the provisions of ordinary laws, as it was the case of the right to challenge in courts the unlawful administrative decisions. A Constitution sets out only the general principles of the guarantees of human rights and freedoms of the individuals. The procedures for enforcing what is provided in the Constitution are settled in the provisions of the procedural codes. Thus, the provisions of *Criminal Procedure Code* enable the

¹⁸¹ The *Code of Administrative Procedures* entered into force in 20 January 2000. See note 124.

¹⁸² *Soering v. UK*, *supra* note 43, at para. 121, also *James and Others v. UK*, *supra* note 53, at para. 86.

individuals to ask the reinstatement of their rights upon the finding that an illegal decision has been made.¹⁸³ Moreover, the provisions of this code regulate in details the individuals' rights related to the principle of the due process such as, the rights of defendants during the pre-trial proceedings and during the judicial process,¹⁸⁴ the frequency of meetings with the defense counsel,¹⁸⁵ the invalidity of evidence taken in an illegal way,¹⁸⁶ the terms of pre-trial detention,¹⁸⁷ etc.

As regard the rules of civil procedure, they enable the individuals to bring lawsuits in court against any private or public subject that has allegedly violated the civil laws.¹⁸⁸ These rules guarantee the taking of a decision by the court based only on the facts and evidence presented during the judicial process,¹⁸⁹ provide for the legal representation of the persons with limited legal capacities,¹⁹⁰ the rights of the parties of a civil conflict to have their case examined by an arbitration court in the national or international level,¹⁹¹ etc. Finally, the Code of Administrative Procedure regulates in details the procedures of administrative recourses.¹⁹² It also regulates the responsibility of public administration bodies and their employees for the damages caused to the private parties due to their illegal acts,¹⁹³ the right of the individuals involved in administrative conflicts to receive all the necessary information,¹⁹⁴ the obligation

¹⁸³ *Albanian Criminal Procedure Code*, 1995, Art. 9.

¹⁸⁴ *Id.* at arts. 248-259, 335.

¹⁸⁵ *Id.* at arts. 48-53.

¹⁸⁶ *Id.* art. 151.

¹⁸⁷ *Id.* at arts. 263-267.

¹⁸⁸ *Albanian Civil Procedure Code*, 1996, Arts. 1-3.

¹⁸⁹ *Id.* at art. 9.

¹⁹⁰ *Id.* at art. 91.

¹⁹¹ *Id.* at arts. 403, 439.

¹⁹² *Albanian Administrative Procedures Code*, 1999, Art. 137.

¹⁹³ *Id.* at art. 14.

¹⁹⁴ *Id.* at art. 20.

of public administration bodies to notify in due time the interested subjects about the final decision,¹⁹⁵ etc.

A last category of rights that needs attention is that of the rights of the prisoners. As the practice of the European Court has shown, a considerable number of cases alleging a violation of article 13 have been presented by prisoners. This category of persons is exposed to a greater risk of abuse of their human rights than other individuals. Therefore the compliance of the guarantees provided for this category of persons with the substance of the Convention is very essential.

The guarantees of the protection of prisoners' rights are provided in Law No. 8328, dated 16.04.1998, "On the Rights and Treatment of the Prisoners."¹⁹⁶ At the time of adoption of this law, the only provision applicable to this category of individuals was the provision of article 3 of the Constitutional Law No. 7692 dealing with the human rights and freedoms of individuals.¹⁹⁷ This article prohibited the use of torture or inhuman treatment in any occasions. The new Constitution did not bring any new regulation with regard to the rights of prisoners, except for their right to vote that was not provided in the old constitutional provisions. Consequently, this law remains still the only detailed regulation that deals with the rights of the prisoners. However, it accepts the subordination to the highest laws of the country, at that time the Constitution Law.¹⁹⁸ In general, the provisions of this law reflect an elaboration of the principles of respect for human dignity and non-discrimination for any reasons based on sex, nationality, economic or social status, political opinions or religion.¹⁹⁹ As discussed above, these principles are sanctioned also by the provisions of the Constitution.

¹⁹⁵ *Id.* at arts. 56-59.

¹⁹⁶ Law No. 8328, dated 16.04.1998, "On the Rights and Treatment of the Prisoners," Official Journal 1998, Vol. 11, p. 379.

¹⁹⁷ Constitutional Amendment No. 7692, dated 31.03.1993, *supra* note 19.

¹⁹⁸ Law No. 8328, see note 196, at the opening part.

¹⁹⁹ *Id.* at art. 5.

Despite the fact that it refers to the old constitutional provisions, the law seems to fit sufficiently with the basic principles stated in the Constitution and also with the Convention. It deals mainly with the rights and duties of the prisoners during the time spent inside the prisons, as well as, the rights and duties of prisons' authorities. Its provisions regulate in details all aspects of the prisoners' life. The law guarantees the right of prisoners to receive visits from their familiars and friends, to have their own correspondence, to exercise their religion, to meet frequently the legal counsel, etc. However, it provides also the possibility of restricting these rights upon a decision of the Minister of Justice, and in cases of an emergency, major force, important reconstruction within the institution, or when the life and health of the prisoners are in serious danger.²⁰⁰ The law provides the right to complain to the responsible authorities, domestic and international bodies, regarding these restrictions and the manners of application of the constitutionally protected rights.²⁰¹ Domestic bodies could be authorities with effective powers such as the head of the prison or courts, as well as different human rights organizations.²⁰²

The law guarantees the confidentiality of the complaints. If the complaint is directed to the court, the prisoners have the right to challenge its decisions to the higher judicial instances. Consequently, they can also receive remedies for any violation occurred, in the same way as the free individuals. During these proceedings they have the right to be represented by a legal counsel.²⁰³ In case the prisoner is a minor or is mentally sick, the assistance of a legal counsel is financed by the state.²⁰⁴

²⁰⁰ *Id.* at art. 7.

²⁰¹ *Id.* at art. 8.

²⁰² *Id.*

²⁰³ *Id.* at art. 72.

²⁰⁴ *Id.* The same is valid for the prisoners that are foreign citizens, pregnant women or women that have given birth to a child in prison.

In general the law protects adequately the rights of the prisoners and it could be considered substantially compatible with the Convention. However, the reference to the old constitutional provisions should be amended, in order to remain coherent with the new constitutional provisions.

5.4 Conclusion

Generally, it could be argued that the rights of the Convention are substantially protected by the provisions of the Constitution. Also, the provisions of the Convention are given a direct protection upon the recognition of the Convention as the threshold beyond which, the state cannot restrict the constitutionally protected human rights of individuals. This status represents a significant option, because the rights and freedoms guaranteed by the Convention may be invoked and enforced before the domestic courts.

The guarantees provided in other laws enable Albanian individuals to raise the same claims they would have raised if these guarantees were provided in the constitutional provisions. However, it could be argued that the right of the individuals to challenge administrative decisions in courts should have a constitutional status. Although not a requirement of substantive effectiveness, this right should be recognized as a basic human right, similarly with the right to challenge courts' decisions in the courts of higher instances.

CHAPTER VI

REMEDIAL EFFECTIVENESS

6.1 Introduction

Remedial effectiveness relates to the powers of national authorities to redress the harm occurred to those individuals, whose claim of violation of their guaranteed human rights is found true. In simple words, this concept presupposes that national authorities be not only in the position to deal with the claims of complainants but have also the powers to grant remedies for the violation occurred.²⁰⁵ The combination of both these powers would satisfy the effectiveness of remedies as intended by article 13, as far as the powers of the national authorities are concerned. However, as already shown in chapter II this component does not presuppose a favorable decision on behalf of the applicant.²⁰⁶ It is enough that the national authorities have sufficient powers to deal with the claims of individuals.

Actually, the practice of the European Court has not established firm rules on the issue of the powers of national authorities, which would satisfy the requirements of remedial effectiveness. Although the main idea behind this component is that the national authorities be able to take binding decisions, in practice there have been exceptions to this rule.²⁰⁷ Moreover, what has been considered sufficient for granting effective remedies for certain individual claims, has not been considered effective for other claims.²⁰⁸

²⁰⁵ Harris *et al.*, *supra* note 62, at p. 454.

²⁰⁶ Boyle and Rice *v. UK*, *supra* note 47, at para. 78.

²⁰⁷ In *Leander v. Sweeden*, *supra* note 53, at para. 82, the European Court concluded that although neither the Ombudsman nor the Chancellor of Justice had binding powers, the combined recourses to these authorities constituted effective remedies for the purposes of article 13.

²⁰⁸ As already shown in chapter II, the effectiveness of courts' powers in judicial review proceedings has been assessed differently in the case of *Vilvarajah and Others v. UK*, *supra* note 55, and *Chahal v. UK*, *supra* note 56.

The intention of this chapter is to analyze the powers of Albanian national authorities that are responsible for dealing with the claims of violations of the Convention under the principle of remedial effectiveness. It points out the shortcomings, as far as the granting of remedies is concerned. At the end it shows that the currently in force provisions dealing with the powers of the responsible authorities are sufficiently adequate for remedying properly the violations of the individuals' rights committed by state authorities.

6.2 Courts' powers

As already mentioned in chapter III, ordinary courts in Albania resolve the conflicts that relate to laws other than the Constitution. The whole judiciary system functions as a hierarchical structure, meaning that the courts of higher instances can dismiss the decisions of courts of the lower instances. There is a division of jurisdiction between civil and criminal courts. The powers of courts of both jurisdictions are regulated respectively by the provisions of the *Civil Procedure Code* and the *Criminal Procedure Code*. A short description of the criminal, civil and administrative process follows:

6.2.1 Criminal jurisdiction

6.2.1.a Pre-trial criminal proceedings

Albanian current criminal system is based on the principles of the accusatory system.²⁰⁹ This system was adopted in 1995 after the enactment of the Code of Criminal Procedure. According to provisions of this Code, the criminal process involves two parties: the accusation, represented by the prosecution office and the perpetrator assisted by a defense counsel.²¹⁰ Both parties may present evidence in court, in order to support their allegations.²¹¹ The prosecution office is entitled to refuse to initiate criminal proceedings or, may even stop these proceedings in the cases provided by law. When an indictment is not necessary, the prosecution office may initiate criminal proceedings on its own initiative.

When information is received in the prosecution office from police or individuals about a criminal offense, the case is registered and assigned by the chief district prosecutor to a prosecutor who will perform the preliminary investigation assisted by the judicial police. The investigation period begins to run from the day the name of the person to whom is attributed the commitment of the criminal offense is filed, not the day when the case is registered.²¹² The prosecutor may also decide not to prosecute a case if it is determined that no crime was committed or the act committed does not constitute a criminal offense or is

²⁰⁹ This basically means that the case is brought in court by the prosecution office that represents the case on behalf of the affected party. The criminal process during the communist regime was organized based on the principles of the inculpatory process, according to which, courts could initiate criminal proceedings on their motion. Courts could conduct investigations and bring evidence to incriminate the accused person. Obviously, this regulation did not place courts in complete impartial positions. Kreshnik Spahiu, Lecturer of the course of Criminal Procedure Law, University of Tirana, Faculty of Law, *Albanian Criminal Procedural System*, interviewed by the author, Tirana, 18 March 2000.

²¹⁰ *Albanian Criminal Procedure Code*, 1995, Art. 24.

²¹¹ According to article 12 of the Code of Criminal Procedure, the criminal jurisdiction is exercised by the criminal courts that are not special courts, but consist in "penal chambers" within the structures of the courts of Districts and Appeal.

²¹² *Albanian Criminal Procedure Code*, 1995, at art. 323.

pardoned by the President.²¹³ The victim may challenge the decision of the prosecutor in the District Court, which may decide the starting of the criminal proceedings of the case.

The prosecutor has the power to decide whether it is necessary for the needs of the investigation that the suspected person be arrested or be under another security measure. The prosecutor must ask the District Court to impose a security measure²¹⁴ on the suspect depending on the circumstances of the case. In this case, the prosecutor must motivate the request to impose a specific security measure, by showing the needs of security.²¹⁵ Thus, it is the prosecutor who must show why the detention of the accused is necessary. As a rule, the security measures are imposed on the suspected individuals before they are informed of the accusations against them.²¹⁶ Upon the application of the security measure, the respective individuals are notified of the accusations against them.

According to the criminal procedure rules, the time that a person is informed of the accusation against him/her is the moment when he/she becomes a defendant.²¹⁷ It is the prosecutor or the judicial police, authorized by the prosecutor, who must inform the suspected person of the accusations against him/her. At the hearing for validating the act of arrest performed by the prosecutor, the court may decide also to change the security measure of arrest into a less severe one.

Naturally, the individuals against whom a security measure has been imposed have the right to complain against the decision of the District Court regarding the measure. They can file a complaint with the Court of Appeal within 10 days from the day they are informed of the measure or the day it has been applied. They can also complain directly to the High

²¹³ *Id.*, at art. 290.

²¹⁴ In Albanian referred as "coercive measures." *Id.*

²¹⁵ *Id.*, at art. 244/1.

²¹⁶ Halim Islami, Ilir Panda, Kreshnik Spahiu, Artan Hoxha, *Commentary of the Criminal Procedure Code*, (Shtypshkronja MSN, Tirana 1996), at p. 147.

²¹⁷ *Albanian Criminal Procedure Code*, 1995, at art. 34.

Court if they claim that there has been a violation of the law in the making of the decision by the District Court.²¹⁸

According to the *Criminal Procedure Code*, the District Court may impose one of the following security measures on the accused:

- a) prohibition to leave the country;
- b) obligation to appear before the judicial police;
- c) prohibition and compulsion to live in a certain place;
- d) property guarantee;
- e) house arrest;
- f) imprisonment;
- g) temporary hospitalisation in a psychiatric hospital.²¹⁹

In urgent cases, the prosecutor may order the arrest of somebody even without an authorization by the court.²²⁰ In these cases, the accused are taken into interrogation by the prosecutor of the district where the arrest took place. The prosecutor may release the arrested person in case he/she finds out that it was committed a mistake in the application of the procedural laws, or that the arrested person is not the suspected perpetrator.²²¹ Otherwise, within 24 hours from the arrest, the prosecutor must ask the District Court to validate the decision of arrest. If the District Court has not taken a decision within 24 hours from the moment the prosecutor has submitted the request for validating the arrest, the act of arrest becomes invalid and consequently the arrested person must be released.²²²

²¹⁸ *Id.*, at art. 249/1.

²¹⁹ *Id.*, at art. 232.

²²⁰ This includes also the case when the perpetrator is caught at the moment of committing the criminal offense. *Id.*, at art. 252.

²²¹ *Id.*, at art. 257.

²²² *Id.*, at arts. 258-259.

Within three months from the registration of the committed criminal offense, the prosecutor must make a decision about whether the case should be sent to court, dismissed or suspended. The prosecutor may extend the term of preliminary investigations for another three-month period. Further extensions, each no longer than three months, may also be applied if the case requires complex investigations, or when for objective reasons it is impossible to complete the investigations within the extended term of the preliminary investigations. However, the term of preliminary investigations may not be extended beyond the limit of two years.²²³ In extraordinary circumstances, upon the approval of the General Prosecutor, the term of preliminary investigations may be extended up to one year beyond the two-year limit.²²⁴ The decision of the prosecutor regarding the extension may be reviewed by a judge only upon the complaint of the accused. In this case the judge may dismiss the decision of the prosecutor regarding the extension, change the term of extension or leave it as it was.

The security measure imposed against the defendant during the preliminary investigation will expire if, from the day the investigation has started, the prosecutor has not sent the case to court within:

- a) three months for misdemeanors;²²⁵
- a) six months for a criminal offense punishable with a maximum of ten years of imprisonment;
- b) twelve months for a criminal offense punishable with a minimum of ten years or life imprisonment.²²⁶

²²³ *Id.*, at art. 264/3.

²²⁴ *Id.*, at art. 324.

²²⁵ In Albanian referred as criminal contravention. These are minor criminal offenses for which the *Criminal Code* provides a punishment by fine or up to 2 years imprisonment. *Id.*

During the preliminary investigation, upon the request of the prosecutor, the District Court may extend the term of the pre-trial detention if the case is complicated and its investigation requires more time. The extension may be asked only once and may not exceed three months. The pre-trial detention with the extension may not exceed the half of the maximum provided for the criminal offence under proceedings.²²⁷ According to article 263/2 of the *Criminal Procedure Code*, the detention shall lose effect if, from the day of submission of the acts to the District Court, the following time periods have expired without having the sentence rendered:

- a) two months when it is proceeded for a criminal contravention;
- b) nine months when it is proceeded for a criminal offense punishable with a maximum of ten years of imprisonment;
- c) twelve months when it is proceeded for a criminal offense punishable by a minimum of ten years or life imprisonment.

According to subparagraph 3 of the same article, in cases of appeal, the detention shall lose effect if, from the date the sentence in the District Court is rendered, the following time periods have expired without having the sentence rendered by the Court of Appeal:

- a) two months when it is proceeded for a criminal contravention;
- b) six months when it is proceeded for a criminal offense punishable by a maximum of ten years of imprisonment;
- c) nine months when it is proceeded for a criminal offense punishable by a minimum of ten years or life imprisonment.

The prosecutor or the defendant may also ask the court to change the imposed security measure before the expiration of the above terms to a less or more severe one. The

²²⁶ *Id.*, at art. 263/1.

²²⁷ *Id.*, at art. 264/2.

request for changing the imposed security measure is reviewed by the District Court within 5 days from the submission of the request to the court. The District Court can change the security measure to a less severe one when new facts are discovered which reduce the needs of security. An example would be if evidence were discovered that indicated that the crime was committed in the conditions of legitimate defense. The District Court may change the security measure to another one also by its own initiative.²²⁸

As it is obvious from this brief description of the proceedings before the case is sent in court, the prosecutor has broad powers to decide independently from any other judicial authority whether to start the criminal prosecution, to close the criminal proceedings initiated upon complaint or by the prosecution office's initiative, as well as to release individuals in cases of illegal arrest. However, once the case is sent to court, the prosecutor cannot make any further decision on the case, except representing the accusations in court

6.2.1.b Powers of the criminal courts

During the hearings of the case in court, the prosecution and the defendant assisted by a legal counsel may present their arguments following the procedural rules provided in the Code of Criminal Procedure. The decision of the court of the first instance is based only on the facts that have been presented by both parties in court in the form of a confrontation.²²⁹ This decision may be challenged to the court of higher instances within 10 days from the day of its issuance or notification of the parties, through the following procedures:

a) appeal to the Court of Appeal;

²²⁸ *Id.*, at art. 260.

²²⁹ *Id.* at art. 3.

b) recourse to the High Court;²³⁰

c) request for a review of the decision.²³¹

The Court of Appeal reviews all facts of the case and may take a decision that reverses the decision of the court of first instance. Thus, individuals can have a second examination of their cases in all aspects. Moreover, the decision of the Court of Appeal cannot be more severe than the decision of the District Court, if the case has been appealed by the defendant.²³² The decisions of the Court of Appeal may be challenged in the High Court, but only for specific reasons. According to article 432 of the *Criminal Procedure Code*, individuals can make recourse to the High Court against the final decisions of lower courts, for the following reasons:

a) non-observance or misapplication of the criminal law or other relevant legal provisions;

b) non-observance of the procedural provisions that consequently have caused the invalidity, refusal or loss of a lawful right;

c) lack of reasoning or an illogical decision, when it results from the text of the decision subject to appeal.²³³

Individuals can also challenge directly in the High Court those judicial decisions that are allegedly in violation of their personal freedoms.²³⁴ In contrast to the powers of the Court of Appeal, the High Court reviews only those aspects of the case relating to the reasons of the complaint. However, article 434 provides that the cases that are examined only by the High

²³⁰ The High Court is composed of criminal and civil councils that deal respectively with civil and criminal cases. *Albanian Criminal Procedure Code*, 1995, Art. 437.

²³¹ *Id.* at art. 407.

²³² *Id.* at art. 425/3.

²³³ *Id.* at art. 432.

²³⁴ *Id.* at art. 431.

Court must be reviewed thoroughly, including fact-findings and merits of the case.²³⁵ At the end, the High Court may:

- a) drop the complaint, if the challenged decision is found to be in conformity with the material and procedural laws;
- b) modify the complained decision, for the part that relates to the legal qualification of the unlawful act committed, the sentence of punishment and the civil consequences of the offense committed;
- c) dismiss the complained decision and take another decision;
- d) send the case back to the court that has taken the original decision, for a reexamination.²³⁶

The final decision of the criminal council of the High Court may still be challenged in the Joint Councils of the High Court, through a procedure that is called "Recourse in the Interest of Law." Such recourse may be applied only for specific reasons that must relate to any of the conditions required for making recourse to the High Court.²³⁷ The right to apply to the joint colleges of the High Court must be exerted within 1 year from the day of the final decision, whereas the time limit for other complaining procedures is 10 days from the day of the final decision.²³⁸

As it could be easily concluded from the above lines, all court instances have the power to deal with the complaints of the individuals concerning violations of their rights and to take binding decisions. As regard material remedies, which are also important for complying with remedial effectiveness, the *Criminal Procedure Code* provides compensation for the persons that have suffered from illegal decisions of the courts. Article 268 provides that in case the accused has been found innocent, the prosecutor or the court has closed the

²³⁵ This could be the case of the dismissed judges, who according to article 147 of the Constitution may complain only to the High Court.

²³⁶ *Albanian Criminal Procedure Code*, 1995, Art. 441.

²³⁷ *Id.* at art. 432/a.

case they have the right to ask compensation for the pre-trial detention period. The same is provided for persons against which was imposed a security measure that did not respond to the gravity of the case.²³⁹ However, the granting of the compensation is conditioned upon the finding that the making of the illegal decision was not fully or partially caused by the actions of the individuals.²⁴⁰ The article does not elaborate with regard to the second case. It sounds like individuals are not entitled to ask for compensation in case the illegal decision was only partly influenced by them. It seems logical to argue that in cases of partial faults, individuals should still receive compensation for that part of the decision that was not affected by their wrongful actions. This is very important for the requirements of remedial effectiveness. It would be easy for courts to determine the part of the fault of judicial officers after the determination of the partial fault of the individuals.

6.2.2 Civil jurisdiction

According to the provisions of the *Civil Procedure Code*, the courts of the civil jurisdiction deal with the civil conflicts.²⁴¹ The provisions of this Code sanction the obligation of the civil court to deal with any civil conflict that may be presented by individuals. In no case may the courts refuse to review a civil conflict, even if there are no provisions that regulate explicitly the conflict presented in court.²⁴² This provision is a strong

²³⁸ *Id.* at arts. 415, 432/a.

²³⁹ *Id.* at art. 268/2.

²⁴⁰ *Albanian Civil Procedure Code*, 1996, Art. 268.

²⁴¹ *Id.* at art. 36.

²⁴² *Id.* at art. 1.

remedial guarantee of the civil procedural law, since according to it no civil conflict may fall out of the ambit of the civil courts.

In difference to the criminal jurisdiction, only the parties can put the court in motion for initiating a civil judicial process, except when the law provides otherwise.²⁴³ Consequently, both parties must bring evidence in court in order to sustain their claims. The court of the first instance, namely the District Court is obliged to hear the arguments of the parties presented based on the principle of "contradiction." According to this principle, both parties are in equal position before the court, whose final decision is based only on the facts and evidence that have been presented during the judicial process.²⁴⁴ On the other hand, the procedural provisions oblige the parties of a civil conflict to inform each other of the facts, evidence and legal provisions on which they are going to base their assertions.²⁴⁵ Such obligation is considered necessary for the protection of the interests of both parties.

The decision of the District Court may be challenged by both parties in the Court of Appeal.²⁴⁶ The Court of Appeal reviews thoroughly all details of the case complained, without being limited at the reasons of the appeal. After reviewing the case, the Court of Appeal can:

- a) drop the complaint, thus leave in force the decision of the District Court;
- b) change the original decision;
- c) dismiss the decision;
- d) annul the decision and send the case to the District Court for a review.²⁴⁷

²⁴³ *Id.* at art. 2.

²⁴⁴ *Id.* at art. 10.

²⁴⁵ *Id.* at art. 19.

²⁴⁶ *Id.* at art. 452.

²⁴⁷ *Id.* at art. 466.

The final decision of the Court of Appeal may be challenged in the High Court, for the following reasons:

- a) there has been a violation or misinterpretation of the material laws;
- b) there has been a violation of the procedural provisions;
- c) the court has rejected the request of one of the parties to present during the hearings an evidence considered fundamental for sustaining their claims;
- d) the reasoning of the decision of the court is irrational;
- e) there has been a violation of the provisions on the jurisdiction and competence of the courts.²⁴⁸

The above reasons are valid also for making recourse to the High Court against the final decisions of the District Court. Similarly with the criminal jurisdiction, the High Court does not review the fact-finding of the case complained, but limits itself on the reasons of the complaint, which must be based on any of the grounds provided in article 472 above. Finally, the final decisions of the High Court may also be challenged to the joint colleges of the High Court, if any of the reasons provided by points a, b and c of article 472 applies. This right should be exerted within three years from the day of the final decision of the High Court.²⁴⁹

As regard material remedies, under the civil law every deficiency in the execution of the obligations by the debtor obliges him to compensate the damage suffered by the creditor, except when the debtor proves that non-fulfillment of the obligation has occurred due to objective reasons. The debtor is responsible for the non-fulfillment of the obligation when, intentionally or by negligence, has created circumstances that have made impossible the execution. The debtor is also responsible if he has not taken measures to prevent the non-

²⁴⁸ *Albanian Civil Procedure Code*, 1996, Art. 472.

²⁴⁹ According to article 473 of the *Code of Civil Procedure*, joint colleges are composed of five judges of the High Court chosen by lot.

fulfillment of its obligation.²⁵⁰ In both cases the creditor has the right to ask the followings from the debtor:

a) execution in nature of the obligation, as well as the compensation of the damage caused by the delay of the execution, or

b) compensation of the damage caused by non-execution of the obligation.²⁵¹

The creditor is fully entitled to ask the court to oblige the debtor to comply with the above provisions, in case the latter does not fulfill its obligations voluntarily.²⁵² In case the debtor still does not fulfill its obligations toward the creditor, the office of the enforcement of courts' decisions starts the forced execution of the obligation and may also impose a fine on the debtor.²⁵³

Although the above description of the powers of civil courts represents only the theoretical part of the problem, it could be argued that the range of recourses provided for complaints related to civil conflicts is broad enough to cover any complaint of the individuals related to a civil conflict. It seems very unlikely that a concrete civil conflict finds no remedy in civil courts, from the point of view of powers to deal with it and to redress the damage.

6.2.3 Administrative jurisdiction

As already mentioned above, civil courts in Albania have the power to review the decisions of administrative bodies on the grounds of conformity with the legal norms.²⁵⁴ The

²⁵⁰ *Id.* at art. 480.

²⁵¹ *Albanian Civil Code*, 1995, Art. 476.

²⁵² *Albanian Civil Procedure Code*, 1996, Art. 518.

²⁵³ *Id.* at art. 606.

²⁵⁴ See chapter V, Part. 5.2.

scope of these powers is important for assessing the remedial effectiveness of this type of recourse.

Administrative decisions should be challenged in court within 30 days from the day of publication or notification of the decision of the highest administrative authority that has reviewed it, except when the law provides direct recourse in court. Indirectly, this provision implies that those administrative decisions that are challenged in court must have exhausted all administrative recourses available, except if otherwise provided by the law.²⁵⁵ According to the civil procedure provisions, any subject can file a suit in the administrative section of the District Courts, seeking the annulment or modification of a decision taken by an administrative body. They may do so only if they argue that the act or decision violates their legitimate rights and interests.²⁵⁶ Civil courts may review also the complaints against the refusal of an administrative decision or delays in the decision making process of an administrative decision.²⁵⁷ It is clear that in these cases the court reviews only the reasoning of the administrative body for refusing the approval of the administrative act or for not approving it in due time.

Upon the request of the interested subjects, the court can suspend the execution of the administrative decision that has been challenged in court.²⁵⁸ In this case, the court must give reasons for suspending the administrative decision. Generally, the suspense is related to the risk of causing a great and irreparable harm to one of the parties in conflict.²⁵⁹ The right of the courts to suspend the administrative decisions during the judicial examination had been recognized a sort of constitutional status by the previous constitutional provisions. Thus, in a

²⁵⁵ *Id.* at art. 328.

²⁵⁶ *Albanian Civil Procedure Code 1996*, Art. 325.

²⁵⁷ *Id.*, at art. 324/b.

²⁵⁸ *Id.* at art. 329.

²⁵⁹ Decision No. 9 of the Constitutional Court, dated 31.07.1995, *Official Journal* 1995, Vol. 20, at pp. 894-896.

case of practice, different subjects challenged the constitutionality of Law No. 7916, dated 12.04.1995, "On some Changes of the Law No. 7698, dated 15.04.1993, 'On the Restitution and Compensation of Ex-Owners of Lands,'" namely paragraph 3 of article 9. This article stated the right of the owners that had been expropriated by the state during the communist regime to receive back their properties, and in paragraph 3 it provided that the decisions of the Commission for Restitution and Compensation of Ex Owners could not be suspended by a court decision, even in the case of a judicial process going on at the same time. The Constitutional Court held that such provision impeded courts to exercise their powers under the procedural provisions to review and suspend if necessary, those administrative decisions that could affect the legitimate rights of the citizens. On the other hand, the Constitutional Court argued that the provisions of this law were against the constitutional provisions since they denied courts the power to take temporary measures for situations pending on the results of cases under adjudication. As a consequence, the Constitutional Court decided to abolish paragraph 3 of article 9 of the above law, as against the constitutional provisions.

The main arguments of the Constitutional Court in this case were based on article 2 of the Constitutional Amendment No. 7561. This article defined the courts as the sole authorities to resolve conflicts and disputes related to the application of constitutional provisions and other laws, impose criminal punishment and civil liability, restate the rights and obligations of the parties, as well as, to order measures for protecting and establishing the individuals' rights after a fair and equitable legal process and in conformity with the international standards.²⁶⁰

The new constitutional provisions do not contain such a definition with regard to the powers of courts. However, as showed above, the provisions of the *Civil Procedure Code* state clearly the power of civil courts to suspend the administrative decisions under

²⁶⁰ Constitutional Amendment No. 7561, dated 29.04.1992, *supra* note 103.

examination in order to protect individuals from being caused an irreparable harm. After reviewing the case, the court of the first instance may decide to:

- 1) drop the complaint if the administrative act is found to be fair and conform the laws in force;
- 2) declare the invalidity of the administrative act;²⁶¹
- 3) annul, partly, or completely the administrative act.²⁶²

Courts are required to reason their decisions.²⁶³ Similarly to the other jurisdictions, the provisions of the Code provide the possibility to challenge the decision of the District Court before the Court of Appeal and the High Court.

From the above description it seems that judicial review proceedings in civil courts are not limited to the examination of the respective decision only on the grounds of illegality, irrationality, or procedural impropriety, as it is the case of British courts. A general claim of violation of any of the legally protected rights is sufficient for initiating a judicial review process. However, neither the *Civil Procedure Code* nor the Code of Administrative Procedure provide anything with regard to the deepness of the judicial review proceedings. The respective civil procedure articles dealing with the administrative jurisdiction of courts do not specify whether courts can analyze all aspects of the administrative decision or, instead are limited only to the reasons of the complaint. This is obviously a consequence of the poor regulation of the institute of judicial review, whose implications cannot be exhausted by only few articles of the civil procedure law. Taking into account the specifics of the recourses that public law offers in relation to the administration, the necessity to have clear

²⁶¹ According to the provisions of the *Code of Administrative Procedures*, the invalidity of the administrative acts may be absolute or relative. In the second case, the administrative act produces the effects of a valid/regular administrative act until revoked/repealed by the competent administrative or judicial organ. *Albanian Code of Administrative Procedures*, 1999, Arts. 118-119.

²⁶² *Albanian Civil Procedure Code*, 1996, Art. 331.

²⁶³ *Id.* at art. 332.

procedures for such recourses, and especially, the importance of the administrative jurisdiction of courts, it would be better if a proper law regulated the administrative jurisdiction of courts. However, despite the lack of a more precise regulation, generally, it could be stated that the powers of civil courts are adequate for the purposes of remedial effectiveness.

6.3 Constitutional Court

The Constitutional Court has been given the powers to dismiss decisions and acts that are in violation of the constitutional rights of the citizens.²⁶⁴ According to paragraph f of article 131, the Constitutional Court has the powers to make the final decision on the individuals' complaints concerning violations of the constitutional rights to a due legal process, after the exhaustion of all the legal recourses available.²⁶⁵

In fact, this provision raises several questions. Thus, it seems like the Constitutional Court is placed on the top of the judicial system for the claims of the individuals related to the rights to due process.²⁶⁶ In other words, individuals must go through all instances of the judicial system before filing a complaint with the Constitutional Court. Logically, in this

²⁶⁴ See note 119.

²⁶⁵ *Id.*

²⁶⁶ Here could be included article 28 that states the right of individuals to be informed on the offense for which are being accused and have the decision of arrest validated by a judge within 48 hours; article 29 that states the prohibition of the retroactivity of the criminal law; article 30 that guarantees the presumption of innocence; article 31 that guarantees the right of the defendant during the criminal process; article 32 that states the invalidity of evidence taken in an illegal way and the right of individuals not to testify against their familiars or themselves; article 32 that provides the right of the defendant to be heard before being adjudicated; article 34 that provides the right not to be punished more than once for the same criminal offense, except in the cases provided by law. However, it is up to the Constitutional Court to determine whether a concrete claim relates to the rights for a due legal process.

case the decision of the Constitutional Court would reverse the decision of the High Court that is the highest court instance in the ordinary court system.

On the other hand, it is argued that this provision does not place the Constitutional Court in the position of the forth court instance of the judicial system. The Constitutional Court will adjudicate only the constitutional compatibility of the act that has allegedly violated any of the rights to due process. The requirement of exhaustion of the available judicial recourses implies only that each of these instances should have concluded that the claim of violation of the right to due process falls within the jurisdiction of the Constitutional Court.²⁶⁷

Another argument could be that the above provision empowers the Constitutional Court to review judicial decisions related to any of the rights to due process, on the grounds of compatibility with the constitutional provisions. As shown above, the Constitutional Court does not have the power to assess the constitutionality of the decisions of judicial authorities.²⁶⁸ Consequently, the right of the Constitutional Court to assess the constitutionality of courts' decisions for the cases that relate to the rights to due process might be the exception that paragraph f wants to make. The practice of the Constitutional Court since the adoption of the Constitution till the present day does not help to clarify the meaning of paragraph f of article 131, since there are no judgments related to this provision. Hopefully, the future practice will provide a clearer definition of the position of the Constitutional Court with regard to the claims related to the rights to due process.

Another issue that needs to be discussed relates to the powers of the Constitutional Court once a violation of any of these rights is found. Thus, it is not clear whether the Constitutional Court has only the powers to judge on the claim of violation of any of the

²⁶⁷ Loloçi K., *supra* note 95.

²⁶⁸ See note 119.

rights related to the principle of due process or, it has also the powers to compensate and rehabilitate the affected persons. Such powers were of a certain importance in the former constitutional provisions since they afforded to the former Constitutional Court the powers to suspend the implementation of a law or normative acts of the central and local government, during the time of assessment of its constitutionality. In case the Constitutional Court concluded that one of the rights protected by the constitutional laws had been violated, it could declare its abrogation and also take measures for repairing the situation and compensating the individuals for the damage incurred.²⁶⁹

In fact, the old constitutional provisions seem to confuse the position of the Constitutional Court with that of the ordinary courts of the judicial system. The Constitutional Court is not projected to function as an ordinary judicial instance. Consequently it cannot provide remedies in the form of compensation or reparation. However, its final decision may oblige courts (for the cases of complaints related to the individuals' rights to due process), or other authorities of the public administration (for the acts that are assessed as being unconstitutional) to repair the violation occurred and also grant material compensation for the affected individuals. Therefore it could be argued that the lack of provisions on the remedial powers of the Constitutional Court does not affect the rights of individuals to be compensated for the harm caused by the unconstitutional act.

As regard to other powers of the Constitutional Court, as already mentioned in chapter III, the abrogation of laws and other normative acts on the grounds of compatibility with the Constitution and international laws, including the Convention, is not relevant to the issue of remedies, as intended by article 13 of the Convention.²⁷⁰ However, the powers of the Constitutional Court to dismiss normative decisions of the governmental bodies as being

²⁶⁹ Constitutional Amendment No. 7561, dated 29.04.1992, *supra* note 103, Art. 24/10.

²⁷⁰ As pointed out in chapter II, article 13 does not entail the possibility of challenging national laws as being contrary to the Convention.

unconstitutional, could be considered as a sort of judicial review process, which is not conditioned on any characteristic of the decision challenged except the violation of the constitutionally protected rights of the individuals.²⁷¹ As such, these powers of the Constitutional Court could not be considered but advantageous for the individuals, which are fully entitled to make use of them in the cases specified in the Constitution.

6.4 Administrative authorities

As mentioned in chapter III administrative bodies may review the decisions of lower administrative bodies on the grounds of illegality or irrationality.²⁷² The *Code of Administrative Procedures* is very precise with regard of the powers of administrative bodies regarding the complaints received by the individuals. Administrative bodies have the power to repeal or revoke totally or partially the contested administrative acts, as well as, to oblige a lower administrative body to issue an act that was refused before.²⁷³ Every individual has the right to ask the administrative bodies to exercise such powers in case of an act allegedly in violation of their rights. On the other hand, the administrative body that issued the contested act may review its decision, if so required by the individuals, and revoke it in case it concludes that is illegal or irregular.²⁷⁴

According to the administrative procedure provisions, administrative decisions enter into force at the same day of approval, while the interested subjects must be notified within 8

²⁷¹ *Chahal v. UK*, *supra* note 56.

²⁷² *Albanian Code of Administrative Procedures*, 1999, Art. 137/2. See also chapter III, part 3.4.

²⁷³ *Id.*, at art. 146.

²⁷⁴ As already discussed in chapter IV, part 4.3, this sort of recourse does not comply with institutional effectiveness.

days on the decision taken by the administrative body.²⁷⁵ The time limit for challenging an administrative act through administrative recourses is one month from, a) the day the appellant received notice of the act or non-issuance of the act; b) the publication of the act based on the provisions of the Code.²⁷⁶ During the time that the respective administrative authorities are examining a challenged administrative decision, its application will be suspended.²⁷⁷ The suspension is a safe measure for protecting individuals from being caused an unjust and irreparable harm. In total, the appealing procedure must not exceed the limit of 1 month from the date of submission of the appeal. If no decision is taken by the end of this term, the interested parties have the right to send the case to the court.²⁷⁸

6.5 Office of the People's Advocate

As mentioned above, the institute of the Ombudsman, or the People's Advocate, was regulated for the first time in November 1998, the time of the adoption of the new Constitution. The People's Advocate is intended to act as an officer in defense of the legitimate rights and interests of the individuals against the unlawful acts of the public administration bodies. According to the provisions of chapter VI of the Constitution, any person can file a complaint with the People's Advocate, who can then institute proceedings in

²⁷⁵ *Albanian Code of Administrative Procedures*, 1999, Art. 59.

²⁷⁶ *Id.* at art. 140/1. However, the second paragraph of the article is confusing. It provides that in the case of non-action by the administration (non-issuance of an act), the procedure of appeal begins three months from the day the original request for issuance of the administrative act was deposited. The two paragraphs seem confusing with each other, since point a) of the first paragraph provides clearly that the one-month term will apply also to the case of non-issuance of the act by the administrative authorities. It is not clear what is the status of the one-month term in relation to the one of three months. It seems like in this case the procedure of appeal may not be initiated before the end of the three-month term, although the time passed from the day of notice of non-issuance of the act could have exceed the term of one month.

²⁷⁷ *Id.* at art. 138/1.

²⁷⁸ *Id.* at art. 141.

the Constitutional Court. Its office is entitled to request the responsible authorities of the public administration to provide all the necessary material, as well as written explanations regarding the issues raised by the individuals. Public authorities are obliged by the Constitution to give to the People's Advocate everything requested related to the case of complaint.²⁷⁹ After analyzing the foundedness of the claims of the individuals, based as well on the collected evidence and facts, the People's Advocate can make recommendations and propose measures to the responsible authorities on the ways to remedy the violation occurred. The People's Advocate reports annually to the Albanian Parliament and is entitled to ask the Parliament to hear its reports regarding issues that involve serious human rights problems.

As it is clear from the above provisions, the powers of the Albanian People's Advocate are limited to the proposals and recommendations. It does not have powers to decide on the measures to be taken in case of a violation occurred. He/she may only urge the responsible authorities to take the necessary steps for remedying the harmed individuals. As a consequence the People's Advocate cannot provide remedies for these violations. Comparing these articles with the criteria of the effectiveness of remedies as identified by the European Court, it is easy to conclude that the powers of the People's Advocate are not sufficient to remedy effectively violations of the rights guaranteed by the Convention.

However, despite its limited powers, the institute of the People's Advocate serves to enhance the responsibility of the state with regard to the protection of the basic individual human rights and freedoms that are afforded a constitutional protection. The institution of the People's Advocate could not have broader powers, since it is not a court and therefore could not be given binding powers. The intention behind this institution is to give to all individuals, especially those who cannot afford a judicial process due to limited financial sources, the possibility to use recourses other than the judicial ones for resolving their cases.

²⁷⁹ *Albanian Constitution* 1998, Art. 63.

The process of complaining to the People's Advocate is free of charge and it takes less time than the judicial procedures in courts. Moreover, there is no obligation for the individuals to exhaust all available local recourse before submitting a complaint with the office of the People's Advocate. In other words, individuals can file an application with the People's Advocate and at the same time initiate judicial procedures before the courts. The application to the office of the People's Advocate combined with the recourse to other instances with binding powers, such as courts or administrative authorities, would be a sort of cumulative remedies, which as already mentioned in chapter II, could satisfy the requirements of article 13.²⁸⁰ On the other hand, although the People's Advocate does not have the power to take binding decisions and, thus, can not be considered effective if applied alone, it may still be effective for resolving certain individuals' claims by exerting the power to ask the Constitutional Court to review laws allegedly conflicting with the basic human rights and freedoms. People's Advocate may also stimulate the Parliament to adopt laws that would affect positively specific human rights issues.²⁸¹

²⁸⁰ See note 70.

²⁸¹ In a study conducted by the Albanian Institute of Contemporary Studies, the majority of Albanian individuals expressed their concerns about the amount of independence that can be expected from the person in the position of the People's Advocate. This concern relates to the election of the People's Advocate by the Parliament that is dominated by the majority of the political party that has won the elections. Other concerns relate to the possibility of corruption of the person of People's Advocate, the difficulties that this office would face because of the institutional bureaucracies, the necessity of a honest person in this position, the possibility of electing the People's Advocate by a referendum as a safer measure for the independence of this institution, etc. Mezini, Sh. The Ombudsman and its Perspective in Albania, 1998, Institute of Contemporary Studies, Tirana, at pp. 23-27. Some of these concerns reflect the practical difficulties that Albanian citizens have experienced these last years in their contacts with the public administration and other official institutions. Since this institution is a new one, only the practice will prove the rationality of these concerns.

Conclusion

In theory, the judicial system in Albania generally addresses effectively the complaints of individuals concerning violations of their rights. Civil and criminal courts have sufficient powers to deal with the respective conflicts, as well as, to compensate the violations occurred. Administrative bodies are also sufficiently effective in terms of the powers to deal with the claims of the individuals and to afford compensation, while the powers of the People's Advocate could not be considered as remedially effective for the purposes of article 13.

However, the lack of compensation for the individuals that have suffered an illegal criminal decision due partially to their own actions could be considered as a shortcoming in terms of remedies. Administrative jurisdiction of civil courts also requires a more accurate regulation. Although the provisions of the civil procedure define clearly the powers of civil courts regarding the administrative conflicts, issues like the deepness of the judicial review and other specific characteristics of the judicial examination of administrative decisions must be afforded a proper regulation of its own. Except for the issue of partial compensation for illegal judicial decisions, in general the powers of the Albanian authorities that are responsible for dealing with the claims of violations of the Convention comply in a satisfactory way with the component of remedial effectiveness.

CHAPTER VII

Material Effectiveness

7.1 Introduction

Material effectiveness is the fourth component of the notion of effectiveness, as interpreted by the European Court under the terms of article 13. Basically, this component requires that the national laws be "able" to afford to the citizens the possibility of taking legal action on what is stated in their provisions. In other words, there should be a relationship between what is written in the laws and what the individuals can practically enjoy. The issue of material effectiveness is particularly complex in the case of those individuals that cannot take legal actions on behalf of themselves, due to their limited legal capacities. This is usually the case of mentally ill or minor persons.

In a case from the practice, the unavailability in the national level of procedural provisions allowing the parents of a mentally ill minor to pursue criminal proceedings on behalf of her, was found by the European Court to be in breach of article 13.²⁸² Other cases have brought up the same lack of material effectiveness, where the persons with a limited right to movement could not initiate legal proceedings on behalf of themselves.²⁸³ In other words, if the national laws do not provide the ways these individuals can get remedies like the others, these laws will no longer be considered as satisfying the criteria of effectiveness, as required by article 13. The same conclusion will derive if the national laws would contain

²⁸² *X and Y v Netherlands*, *supra* note 60.

²⁸³ *Abdulaziz, Cabales and Balkandali v. UK*, Judgement of 28 May 1985, Series A, No. 94. In this case, the European Court found the immigration rules, which permitted men with a residence permit in UK to bring their spouses into the country but prohibited women from doing so, in violation of article 13.

what is necessary with regard of the literal guarantees, but would lack precision in terms of the procedural means for the individuals to implement them.

This chapter deals with the amount of effectiveness of the Albanian laws compared to the requirements of material effectiveness. It brings a general overview of the requirements of legal capacity, as a necessary condition for taking actions in cases of violations. The deficiencies of the procedural provisions, from the point of view of the advantages that the individuals can make out the theoretical stipulations of the laws are also covered in this chapter. It shows that, as a consequence of the procedural gaps in the rules regarding the implementation of courts' decisions, the individuals do not get the remedies as provided in laws.

7.2 Legal Capacity

The direct enjoyment by the individuals of the rights provided in the domestic law is related to their legal capacity. Thus, Albanian citizens may enter into legal relationship only upon acquiring full legal capacities. Albanian citizens acquire full capacity to undertake civil duties consequently to their own actions, upon reaching the age of eighteen years old. The wife who has not reached this age wins full legal capacity through marriage.²⁸⁴ She does not lose the legal capacity even when the marriage is declared invalid or is solved before reaching the age of legal capacity. The minors that have not reached the age of fourteen years old do not have legal capacity. They may perform legal transactions that are suitable to their age and may be fulfilled instantly, as well as other legal transactions that generate benefits without the need of compensation. Otherwise, legal transactions are performed on

²⁸⁴ *Albanian Civil Code*, 1994, Art. 6.

the minors' behalf by their legal representatives.²⁸⁵ The minors that have reached the age of fourteen years old may perform legal actions only upon the consent of their legal representative. However, they may be members of social organizations, dispose what earned from part time work, deposit the savings and control these deposits.²⁸⁶

As regard the criminal responsibility, according to the criminal laws, a person bears criminal responsibility if, at the time of commitment of a criminal offense, has reached the age of fourteen years old. A person that commits a criminal contravention bears responsibility at the age of sixteen years old.²⁸⁷ The person injured by the criminal offenses or his successors has the right to ask for criminal prosecution of the alleged perpetrator, as well as, compensation of the damage occurred. If the injured person does not have legal capacity, his/her rights recognized by law may be exercised by the legal representative.²⁸⁸ The terms "*rights recognized by law*" logically include all the procedural and material rights guaranteed by the Constitution and ordinary laws. Therefore, it could be presumed that no situation would fall out of the ambit of these provisions.

Another category of subjects whose rights may be easily prejudiced is the category of the prisoners. The currently in force regulation of the rights of prisoners does not foresee a limitation of their legal capacity.²⁸⁹ The prisoners enjoy full right to complain on behalf of themselves and to bring actions against any violations committed during the time they are in prison. According to the provisions of Law No. 8328, dated 16 April 1998, "On the Rights and Treatment of the Prisoners," the prisoners may complain with regard of the manner of

²⁸⁵ *Id.* at art. 7.

²⁸⁶ *Id.* at art. 8.

²⁸⁷ *Albanian Criminal Code* 1995, Art. 12.

²⁸⁸ *Albanian Criminal Procedure Code*, 1995, Art. 58.

²⁸⁹ As discussed in chapter V, part 5.3, the current regulation regarding the rights of the prisoners is composed of the respective provisions of the Constitution and the Law No. 8328, dated 16 April 1998, "On the Rights and Treatment of the Prisoners," *supra* note 196.

application of the law and internal rules of the institution, as provided in this law.²⁹⁰ Moreover, article 49 of the law states that prisoners may address their complaints with regard to any violation of their rights, either verbally or in a written form to the following authorities:

- Head of the Prison;
- Inspectors;²⁹¹
- General Head of the Prisons;
- Court of District;
- District Prosecutor;
- Authorities entitled to visit the prisons, as provided by article 43 of this law.²⁹²

These bodies must review the complaints of the prisoners within short time limits, but not later than 1 month from the day of submission. However, the prisoners are also entitled to complain to the prosecutor or the court of the district where the prison is located, for delays in the process of reviewing the complaints by the responsible bodies. In these cases, the prosecutor or the court may order the respective authorities to review the cases presented to them within a fixed time limit.²⁹³ In all these proceedings, the prisoners may be assisted by legal counsel.²⁹⁴ The prisoners may apply personally to different authorities with regard of their cases. They can complain to the Head of Prison or directly to the General Head of the

²⁹⁰ *Id.*, at art. 8/1.

²⁹¹ It is not very clear what does the article mean by 'inspectors.' They might be persons sent, for example, by the Ministry of Public Health to check the sanitary and hygienic standards of the living conditions of the prisoners inside the punishing institutions.

²⁹² Article 43 provides that different state subjects such as the President of the Republic, the Chairman of the Parliament, the Head of the Council of Ministers and its staff, the Chairman of the Constitutional Court, the Chairman of the High Court, the District Attorney, the General Head of the Prisons, etc. may visit the prisons, without the need of any official permission. Other subjects such as Ministers, Deputy Ministers, judges of the Constitutional Court, members of the High Council of Justice, the Head of Municipality etc. can also enter the prisons any time, except the prisons of a high security status, where it is necessary an authorization from the authorities of the prison.

²⁹³ Law No. 8328, *supra* note 196, Art. 50.

²⁹⁴ *Id.* at art. 72.

Prisons, or to the authorities of the last category.²⁹⁵ The recourse to these authorities could be considered as a sort of aggregate of remedies, as interpreted by the Court in the relevant cases.²⁹⁶

In general, there does not seem to be legal impediments for the Albanian individuals to take advantage of the material laws. Except the individuals with limited legal capacities whose rights are exerted by their legal representatives, all individuals may exert directly their rights provided in laws.

7.3 Procedural gaps

The making of a decision by the responsible national authority is only the first step of the process of application of the law. The enforcement of the decision taken is of the same importance for complying with material effectiveness, as the ability to take actions against the responsible subjects. As Harris et al., have noted it is not enough that an effective remedy is available in the national legal system. The applicant must be able to take effective advantage of it.²⁹⁷

The execution of the final decisions of courts in Albania poses serious problems in this regard. What happens very often is that a final court decision is not enforced at all, and this is especially the case of those decisions where the lost party is the state. As a

²⁹⁵ Actually, it is questionable whether the above listing of the subjects in the article corresponds to the hierarchy of these authorities in terms of instances of complaints. Legally speaking, it is not possible to challenge the decision of the District Court to the District Prosecutor. The same could be said also with regard to the decision of the District Prosecutor that may not be challenged to the authorities of the last category listed in the article. Consequently, the ranking of the above subjects should not correspond to their hierarchy. The article should intend only to provide a list of the authorities entitled to receive complaints by the prisoners regarding their treatment, although it should be admitted that it does it in a very confusing way.

²⁹⁶ *Silver case, supra* note 41, *Leander case, supra* note 53.

²⁹⁷ *Harris et al., supra* note 62, at p. 456.

consequence, the individuals are not able to benefit from what is ruled by courts in their advantage. The main problem rests with the procedural regulation, but the lack of awareness of the private parties on the necessity of certain procedures to be followed, is also cause of delays in the enforcement of the courts' decisions.²⁹⁸

Thus, if referred to the provisions of the *Civil Procedure Code*, the obligatory enforcement of the final decisions of courts rests with the Enforcement Office.²⁹⁹ However, this office does not act on its own motion, but upon the request of the winning party. The normal legal procedure of enforcement of judgments, as provided for by the Albanian *Civil Procedure Code*, is as follows:

- 1) After a court order (civil decision) becomes final it constitutes an *executive title*.³⁰⁰
- 2) The winning party in a civil law suit must *request* the court to issue an execution order containing the executive title in his/her favor.
- 3) The winning party in a civil law suit must then *request the enforcement officer* to proceed with the execution of the execution order containing the executive title.³⁰¹

²⁹⁸ Siv Velmar, Program Officer, Human Rights Alert Program (HRAP), OSCE Presence in Albania. "Implementation of Courts' Decisions in Albania," interviewed by the author, Tirana, 22 March 2000.

²⁹⁹ Enforcement offices are the agencies responsible for enforcing courts' judgments in civil and administrative areas. They are attached to Districts Courts throughout the country, but are not part of the judiciary. They are subordinated to the Ministry of Justice. (*note of the author*)

³⁰⁰ According to article 510/a of the *Civil Procedure Code*, executive titles include:

- a. final civil decisions of courts, decisions issued by them for securing the lawsuit as well as for the temporary execution;
- b. final penal decisions, for the part that deals with property rights;
- c. decisions of arbitration courts of foreign countries that have been given recognized in conformity with the provisions of this Code;
- ç. decisions of an arbitration court in the Republic of Albania;
- d. notary acts which authorize the payment of an contractual obligation or any previous obligation directly from the bank deposits or the stipend of the authorizer, as well as, from his credits towards third parties;
- dh. bills of exchange, cheques, and other documents equal to them;
- e. other acts which, according to special laws qualify as executive titles and authorize the enforcement office to execute them. *Albanian Civil Procedure Code*, 1996, Art. 510.

³⁰¹ Article 515 of the *Civil Procedure Code* provides:

The execution title is executed by the enforcement officer on the request of the creditor or the prosecutor for the cases that are brought in court by him.

Thus, according to the regulation of the *Civil Procedure Code*, the party who wins in a civil lawsuit cannot simply sit back and wait for the compensation. Winning the case in court is only the first of three steps that are required to guarantee the enforcement of the courts' decisions. Unfortunately, this may seem a confusing process to non-lawyers and lawyers alike. It would be natural to question here, whether there is really a need for the second step in this three-step process. If a court's final decision constitutes an executive title, why should then the party not be able to request that an enforcement officer proceed directly, without having to seek an execution order to execute the executive title? There is ample ground to argue that this second step is unnecessary, counter-intuitive and actually harmful in the sense that it confuses the public. Regardless, the law is quite clear that the creditor must initiate these steps in order for the court's judgment to be implemented.

Another problem related to the issue of enforcement of judgments relates to the fact that in many practical cases Albanian citizens allege that courts' decisions related to cases where the losing party is a state institution are not being executed. They complain that state institutions often ignore courts' judgments that are in their disfavor and do not comply with the orders of the Enforcement Office for the execution of the courts' judgments. The statistics of the Human Rights Alert Program, which is a part of the legal department of the OSCE Presence in Albania,³⁰² count nine officially received complaints with regard to this problem.³⁰³ In general, the nature of the complaints addressed to the HRAP concern the non-enforcement of courts' judgments that oblige state institutions to pay compensation or perform other pecuniary obligations to private parties. The pecuniary obligations are usually related to courts' judgments on cases regarding such issues as the unlawful dismissal from

³⁰² For the information provided in this part, prior consent has been obtained by the Head of the Legal Department of the OSCE Presence in Albania, Kim Meyer.

³⁰³ These complaints are recorded in the following cases, contained in the files of the HRAP/OSCE office in Tirana, Albania: HARRI LENA/99-053-V; KOLA, LI/98-063-V; ZEKA/99-001-V; CALE/99-007-V; MANO/99-089-V; BASHKIM BREGU/99-098-V; HILA T./99-105-V; QUFAJ/99-106-V; HAJRULLAI/99-

duty,³⁰⁴ property disputes,³⁰⁵ etc. All these complaints have in common the fact that the above state institutions do not enforce the court's decision, which provides the obligation of these authorities to pay the due compensation to the affected individuals. The main justification presented for non enforcement of the courts' decisions by the state authorities seems to have as background the ambiguity and the lack of precision that characterize the procedural provisions dealing with the source of the money for paying damages caused by the state bodies. Thus, paragraph 2 of article 589 of the *Civil Procedure Code* states:

When the budgetary institution does not have money in its bank account and does not have credit against third parties, the respective superior financial organ shall be asked to designate the necessary funds and the chapter of the subject's budget from which the obligation shall be performed, or special financing from the state budget.

According to the customary interpretation of this provision, the “superior financial organ” to the budgetary institutions is usually the Ministry of Finance.³⁰⁶ In this way, if the budgetary institution does not have enough money, it is the superior financial organ—the Ministry of Finance—that should then designate the funds for the payment of the obligation due. Though article 589 above does not specify the authority that must request the respective superior financial organ to designate the necessary funds, the practice is such that, upon notice and official communication by the Enforcement Office, it is the budgetary institution that does so. On the other hand, there is a decision of the Council of Ministers No. 335, dated 02.06.1998, which provides that the regulation of situations involving the execution of

109-V; UJI I FTOHTE/99-119-V. HRAP/OSCE, Tirana, Albania.

³⁰⁴ Case KOLA/98-063-V, HRAP/OSCE, Tirana, Albania. This case involved the dismissal of a diplomat from his position for running for Parliament as candidate of a political party. All courts of the judicial system found the dismissal illegal and therefore provided an obligation for compensation and return in the position, but the Ministry of Foreign Affairs failed to implement it.

³⁰⁵ Case QUFAJ/99-106-V, and HAJRULLAI/99-109-V, HRAP/OSCE, Tirana, Albania. The case relates to the complaint of the applicant regarding the non-enforcement by the Municipality of Tirana of courts' decisions requiring the compensation of the damages occurred to the applicants' property by the Municipality.

³⁰⁶ Çeço S., Professor of Civil Procedure Law at the Magistrates' School, Tirana Albania, *Execution of the civil decisions*, interviewed by the author, University of Tirana, Faculty of Law, 12 February 2000. There may be exceptions for institutions, such as the courts, which possess some degree of budgetary autonomy. See chapter IV, Part. 4.2.

pecuniary obligations by the budgetary institutions should be done on the basis of a joint decision of the Ministry of Finance and Ministry of Justice that will be drafted in the future. This decision has not been drafted yet and consequently until this instruction is drafted, a considerable number of enforcement cases against budgetary institutions will remain on hold.³⁰⁷

However, if the above situation is analyzed within the framework of the existing regulation, it appears that articles 527 and 594 of the *Civil Procedure Code* solve the problem, even in absence of the above-mentioned decision of the Ministry of Finance and Ministry of Justice. Article 527 makes it clear that in cases of pecuniary obligations, the enforcement officer can start the compulsory enforcement after the term of notification for execution has elapsed.³⁰⁸ The compulsory execution consists in sequestration of the debtor's credit account. Moreover, article 594 provides that upon receiving the execution order, the bank detracts from the debtor's account the amount provided in the judgment.³⁰⁹ On the other hand, the Albanian legislation provides strict sanctions against the losing party of a trial that does not comply with the execution order, without making any distinction between private and public subjects.³¹⁰ Logically, such sanctions should be applied against state

³⁰⁷ The HRAP confirmed in 02.02.2000 that such a common instruction has not been issued yet. Josifi E., Associate Attorney, HRAP/OSCE Presence in Albania, *Implementation of Courts' Decisions in Albania*, interviewed by the author, Tirana, 22 March 2000.

³⁰⁸ Article 527 of the *Albanian Civil Procedure Code* provides:

When the execution of an obligation in money is requested, the enforcement officer, upon the expiration of the time-period in the execution notice starts the obliged execution (article 517) by placing on seizure the credits of the debtor and his movable and immovable property to the extent necessary for the fulfillment of the obligation.

³⁰⁹ Article 594, *id.*, provides that, upon receiving the execution order, the bank seizes the account, deposits and credits of the debtor to the amount necessary for the execution of the obligation, without suspending the payment of credits, which as provide by article 605 of the *Civil Code* are paid by preference to the credit on which seizure is placed.

³¹⁰ Article 606, *id.*, provides the following sanctions for a debtor's failure to act:

The enforcement officer has the right to impose a fine of up to 3.000 Lek against the debtor that refuses, performs improperly, does not comply with the time limits or performs the opposite of what is bound to, by means of a court judgment, (and) unless criminal responsibility has incurred.

institutions as well, in case they do not comply with the decisions of the courts. If the discussion goes on the constitutional level, article 142/3 of the *Albanian Constitution* provides that state bodies are obliged to execute courts' decisions. In the hierarchy of the normative acts, the Constitution is on top of it, what means that it supersedes any regulation that conflict with it.³¹¹ Failure to comply with an execution order is a wrongful act that prevents the concerned individuals to get the remedy they deserve for a violation caused by a budgetary (state) institution.

Following these arguments, based on the constitutional and procedural provisions, the affected individuals have enough grounds to bring actions against the state bodies that do not comply with their obligations regarding what is ruled by courts. However, this option may come out with the same result for the same reasons as discussed above: the state bodies would not comply with the courts' decisions. Consequently, the adoption of the joint regulation, which would deal specifically with the manner of execution of courts' ruling by the state bodies, seems to be the best solution. As long as the procedural legislation will remain ambiguous and not firm about the obligation of the state bodies to enforce the courts' decision even in their disadvantage, the individuals will not take advantage of the rights stated in the Constitution and other laws.

An appeal can be filed in court against the decision of the enforcement officer within five days from its announcement or communication.

Upon the request of the enforcement officer, a fine shall be imposed by the court against other persons, who, according to an enforcement order or the law, are bound to perform specific actions in the cases provided for by the first paragraph of this Article.

The decision of the court may be appealed within five days from its announcement or communication.

7.4 Conclusion

All Albanian individuals that possess full legal capacities may take advantage of the legal recourses provided for cases of violation of their substantial rights. Those who have limited legal capacities could exert their rights through their legal representative. However, individuals in Albania face difficulties regarding the enforcement of the rulings of courts in cases where the losing party is the state. Thus, after spending a long time through the instances of the judicial system, the redress of the occurred violation is “stuck” at the phase of execution. The gaps that exist in the current procedural laws are the principal causes of this situation, while the non-application of the sanctions provided for non-compliance with the courts’ decisions should not be pending on the adoption of regulations that would repair these gaps. Consequently, the failure of state bodies to take measures in order to enable Albanian individuals to enjoy the rights recognized by courts amounts to a violation of material effectiveness, and article 13 consequently.

³¹¹ *Albanian Constitution*, 1998, Art. 116.

Conclusions and suggestions

Albanian legal system has evolved significantly these last 10 years of democratic governance. This evolution is especially notable in the field of human rights' protection, reflected first of all in the quality of the formal guarantees of human rights, included in the provisions of the Constitution, as well as, in ordinary laws. The recognition of a domestic status to the ratified international treaties in general, and a constitutional status to the European Convention, represents the most important measure in this respect. Thus, individuals can enjoy directly in the local level the substantial rights provided in the Convention. Besides the formal guarantees of the substantial rights, the introduction of new institutions and procedures has influenced positively the range of recourses provided for cases of violations of the basic individuals' rights. The structure of the ordinary judicial system enables the complainants to have several examinations of their cases on the grounds of violation of the material or procedural provisions.

Administrative recourses represent also an efficient alternative for resolving the conflicts created between individuals' rights and administrative bodies. The interference of courts in the administrative activity, through the review and dismissal of those decisions that conflict with the legally protected rights, is also helpful for those individuals that are not satisfied with the results of the administrative examination of their complaints. Finally, the recourse of individuals directly to the Constitutional Court, for laws and normative acts of the government that conflict with the constitutionally and internationally protected rights, must be estimated positively, although not a requirement of article 13.

However, although the material laws reflect a considerable compliance with the requirements of effective remedies, the same could not be said with regard of the procedural

laws. Whereas, it could be accepted that the components of institutional and substantial effectiveness find a sufficient sustenance in Albanian laws, the requirements of the remedial and material effectiveness are not fully applicable. Thus, the omission of the right to compensation for those individuals that have suffered an illegal criminal decision, partially influenced by their wrongful actions, could amount to a violation of article 13. Given the importance of the redress of a violation occurred, the procedural laws should guarantee the compensation of affected individuals for the part of the mistake committed by courts independently by the individuals' actions.

Further more, the gaps that exist in the procedural provisions, with regard to the execution of courts' decisions by state authorities, prevent individuals to benefit the due redress provided by the rulings of the courts. The pending of the enforcement of what is ruled by courts on the issuance of a specific regulation, amounts to a denial of effective remedies. The scarcity of the procedural provisions is consequently associated with the failure of the current legal system of Albania to comply with the remedial and material effectiveness of the remedies, as required by article 13 of the Convention.

Obviously, the above deficiencies could easily be repaired by employing the necessary legislative measures. Thus, the adoption of the respective regulation regarding the execution of courts' decisions where the losing party of the conflict is the state, and the amendment of the procedural provisions dealing with the issue of compensation of individuals for the harm caused by illegal criminal decisions, would be the initial steps. For the sake of effectiveness of remedies, the rules that will be adopted with regard to the issue of execution of courts decisions by the responsible state bodies, should foresee also the compensation of those individuals that have been affected by the non-execution of the courts' decisions in due time.

Besides the introduction of new remedial provisions, the state should do more also for raising the awareness of Albanian people about the existing provisions that deal with the remedial possibilities in cases of violations of their rights. In this aspect, consistent and regular official publications of laws, legal acts, courts' decisions, as well as, legal scholarship on such issues as, the compatibility with international standards of human rights protection, would help individuals to acquire the basic information about the remedies provided by the current legal regulation of Albania for the cases of violations of their rights. The newly established office of the People's Advocate could be very efficient in this regard. On the other hand, non-governmental organizations operating in the field of human rights protection could do more about the education of the civic society concerning issues of basic importance such as, the practical ways of seeking redress for cases of violation of human rights in the national and international level.

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